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89-6347(2)

DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

FRANK ELIJAH SMITH,

Petitioner,

vs.

RICHARD DUGGER,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
ELEVENTH CIRCUIT COURT OF APPEALS

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Petitioner, FRANK ELIJAH SMITH, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue its Writ of Certiorari to review the judgment and decision of a panel of the Eleventh Circuit Court of Appeals rendered on March 9, 1988, and the Eleventh Circuit panel's order denying rehearing, rendered on October 5, 1989. The Court's decision was rendered final on October 24, 1989.

PROCCEDINGS BELOW

On March 9, 1988, the Eleventh Circuit issued an opinion denying Mr. Smith relief on his petition for a writ of habeas corpus. Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988) (Attachment 1). Mr. Smith timely filed a Suggestion of Rehearing En Banc and Petition for Rehearing, explaining, inter alia, that rehearing was appropriate because the Eleventh Circuit's

disposition of Mr. Smith's claim founded upon Enmund v. Florida, 458 U.S. 782 (1982), was contrary to this Court's opinions in Cabana v. Bullock, 474 U.S. 376 (1986), and Tison v. Arizona, 107 S. Ct. 1676 (1987), and in conflict with the decisions of other Circuit Courts of Appeal applying Bullock. In this case, a case involving no state court finding under Enmund or Tison, and in which the state proceeded on alternative felony murder/ accomplice liability theories (with emphasis on the former), the Eleventh Circuit panel simplistically and erroneously rejected the claim in reliance on the state high court's determination that there was "sufficient" evidence upon which a jury "could have" convicted petitioner of murder. This is strikingly at odds with what Bullock held, and what Bullock requires -- a state court finding of fact. Indeed, the Florida Supreme Court itself expressly found on direct appeal that only two plausible theories existed upon which the guilty verdict could be sustained: accomplice liability or felony murder. Smith v. State, 424 So. 2d 726, 731 (Fla. 1984). Neither theory carries with it an inherent finding that Mr. Smith killed, intended to kill, or attempted to kill. Under the felony-murder theory, in fact, Mr. Smith "as a joint participant in the crime of kidnapping, may be held liable for the acts of his co-felon and is therefore equally guilty, with the actual killer, of the murder . . ." Smith, 424 So. 2d at 731. The finding under Enmund and Tison was not made by the state courts, and none was (nor could have) been made by the Eleventh Circuit panel. Nevertheless, the Eleventh Circuit denied relief. The rehearing petition was denied on October 5, 1989 (Attachment 2).

On October 13, 1989, Mr. Smith filed in the Eleventh Circuit a Motion to Stay Mandate and Reinstate Appeal and Consolidated Motion to Hold Proceedings in Abeyance Pending Disposition of Petitioner's Hitchcock Issue in the Florida State Courts and a Motion to Stay Mandate Pending Application for a Writ of

Certiorari in this Court. On October 24, 1989, the court denied those motions and issued its mandate (Attachment 3).

Mr. Smith herein respectfully requests that this Court issue its Writ of Certiorari to review the judgment of the Eleventh Circuit. Mr. Smith's petition for a writ of certiorari presents substantial questions regarding the conflicts between the Eleventh Circuit's disposition of Mr. Smith's habeas corpus petition and other courts' and this Court's precedents, and also presents significant questions which are proper for certiorari review, one involving an issue which this Court is currently deliberating in a number of other pending cases. To this end, Mr. Smith invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit panel's disposition of the Petitioner's claim under Enmund v. Florida, 458 U.S. 782 (1982), by relying solely upon a general state court accomplice liability/felony murder sufficiency determination, although no finding under Enmund has been made by the state courts, is contrary to this Court's decision in Cabana v. Bullock, 474 U.S. 376 (1986), and in conflict with the decisions of other Circuit Courts of Appeal applying Bullock.

2. Whether the Eleventh Circuit's affirmance of Petitioner's conviction and death sentence notwithstanding the fact that the trial court refused to instruct the jury on Petitioner's sole defense to the capital charges is in conflict with and contrary to this Court's decisions in In re Winship, 397 U.S. 358 (1970), Mullaney v. Wilbur, 421 U.S. 684 (1975), Beck v. Alabama, 447 U.S. 625 (1980), and Crane v. Kentucky, 106 S. Ct 2142 (1986), is in conflict with the decisions of other Courts of Appeal, and is in conflict with the fifth, sixth, eighth, and fourteenth amendments.

3. Whether, given the pendency of Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989), Boyde v. California, 109 S. Ct. 2447 (1989), Walton v. Arizona, 110 S. Ct. 49 (1989), and Saffle v. Parks, 109 S. Ct. 1930 (1989), certiorari review should be granted to review the decision below allowing the execution of Mr. Smith's sentence of death notwithstanding the fact that the trial judge's penalty phase jury instructions shifted the burden to Mr. Smith to prove that death was not appropriate and limited full consideration of mitigating circumstances to those which outweighed aggravating circumstances, and whether the decision below is in conflict with and contrary to this Court's decisions in Mullaney v. Wilbur, 421 U.S. 684 (1975), Mills v. Maryland, 108 S. Ct. 1860 (1988), Lockett v. Ohio, 438 US. 586 (1978), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Penry v. Lynaugh, 109 S. Ct 2934 (1989), and is in conflict with the Ninth Circuit's decision in Adamson v. Ricketts, 865 F.2d 1011 (9th Circ. 1988) (in banc).

JURISDICTION

This Court's jurisdiction with regard to a Petition for a Writ of Certiorari to the Court of Appeals for the Eleventh Circuit derives from 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the fifth, sixth, eighth and fourteenth amendments to the United States Constitution. It further involves Florida Statute 921.141.

STATEMENT OF THE CASE

Petitioner was convicted of first degree murder and was sentenced to death in the Circuit Court for the Second Judicial Circuit in and for Wakulla County, Florida. The Florida Supreme

Court affirmed the judgment and sentence. Smith v. State, 424 So. 2d 726 (Fla. 1982) (Attachment 4). After pursuing state post-conviction remedies, see Smith v. State, 457 So. 2d 1380 (Fla. 1984) (Attachment 5), Petitioner filed his original petition for a writ of habeas corpus in the United States District Court for the Northern District of Florida. In his petition for a writ of habeas corpus, Mr. Smith asserted, inter alia, that his death sentence did not comport with this Court's decision in Enmund v. Florida, 458 U.S. 782 (1982), that the trial court's refusal to instruct the jury on Mr. Smith's sole defense violated due process, the eighth amendment's standards, and this Court's precedents, and that trial court instructions shifted the burden to Mr. Smith to prove that life was the appropriate sentence, in violation of the fifth, sixth, eighth, and fourteenth amendments. The district court denied the petition, and Mr. Smith appealed to the Court of Appeals for the Eleventh Circuit.

On March 9, 1988, the Eleventh Circuit issued an opinion denying relief on Mr. Smith's petition for a writ of habeas corpus. Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988). Mr. Smith timely filed a Suggestion for Rehearing En Banc and Petition for Rehearing, explaining, inter alia, that rehearing was appropriate because the court's reliance on a state court sufficiency finding to deny Mr. Smith's Enmund claim was contrary to Cabana v. Bullock. The court issued an order denying the petition for rehearing on October 5, 1989. On March 13, 1989, Mr. Smith filed, pursuant to Fed. R. App. P. 41(b), a Motion to Stay Mandate Pending Application for a Writ of Certorari. The Eleventh Circuit denied that motion and issued its mandate on October 24, 1989 (Attachment 2).

REASONS FOR GRANTING THE WRIT

1. The Eleventh Circuit's Disposition of Petitioner's Claim Under Enmund v. Florida, 458 U.S. 782 (1982), By Relying Upon Nothing More Than a General State Court Sufficiency Determination, Because Nothing More Exists in the State Court Record, and Notwithstanding the Fact That No Enmund Finding Has Ever Been Made By the State Courts, Is Contrary to This Court's Decisions in Cabana v. Bullock, 474 U.S. 376 (1986), and Tison v. Arizona, 107 S. Ct. 1767 (1987).

The Eleventh Circuit's disposition of Mr. Smith's Enmund v. Florida, 458 U.S. 782 (1982), claim was quite bizarre, and makes absolutely no sense in light of what this Court expressly held in Cabana v. Bullock, 106 S. Ct. 689 (1986).

The Eleventh Circuit denied relief on Mr. Smith's Enmund claim by specifically relying on the Florida Supreme Court's direct appeal statement that "there was sufficient evidence from which the jury could have found appellant guilty of premeditated murder." Smith v. Dugger, 840 F.2d at 793, citing Smith v. State, 424 So. 2d 726, 733 (Fla. 1982)(emphasis added).[1] The Court of Appeals' reliance on the state Supreme Court's sufficiency determination is precisely what this court condemned in Cabana v. Bullock, 474 U.S. 376, 389-91 (1986). Indeed, here, the Florida Supreme Court wrote on direct appeal that there were only two possible theories upon which the jury could have relied to find liability in this case -- accomplice liability (based on

[1] The Eleventh Circuit specifically did not rely on any trial court findings on this issue, stating, "[w]e need not resolve the question of the adequacy of the trial court's finding because a review of the record indicates that the Florida Supreme Court also passed on the issue of Smith's culpability." Smith v. Dugger, 840 F.2d at 793. The trial court findings, although insufficient under Enmund and Bullock, were entitled to absolutely no deference because they were based on codefendant Johnny Copeland's statements, statements which were introduced only at Copeland's trial, and statements which Mr. Smith had no opportunity to address or confront. See Gardner v. Florida, 430 U.S. 349 (1977); see also 28 U.S.C. section 2254(d).

the acts of codefendant Johnny Copeland, who was separately tried) or felony murder. Smith, 424 So. 2d at 731. Neither theory had an inherent intent finding as Enmund, Bullock, and Tison require. Under the felony-murder theory, the state high court wrote that Mr. Smith "as a joint participant in the crime of kidnapping, may be held liable for the acts of his co-felon and is therefore equally guilty, with the actual killer, of the murder. . . ." Smith, 424 So. 2d at 731.

In Bullock, this Court held that a finding satisfying the Edmund requirement that a death-sentenced defendant "have actually killed, attempted to kill, or intended that lethal force be used" must be made by the state courts, and not by a federal habeas court. Bullock, 474 U.S. at 390-91.[2] This Court in Bullock also expressly held that a sufficiency determination is not such a finding. In Mr. Smith's case, by relying upon a sufficiency determination by the Florida Supreme Court, the Eleventh Circuit panel did exactly what Bullock holds a federal habeas corpus court cannot do.

In Bullock, this Court explained that the Mississippi Supreme Court's holdings that "[t]he evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, [the victim]," and that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon [the victim]," 474 U.S. at 389, "represent[ed] at most a finding that . . . [the defendant] by legal definition actually killed." Bullock, 474 U.S. at 390 (citations omitted)(emphasis in original). See also Tison v. Arizona, supra, 107 S. Ct. at 1688 (remanding for proper Enmund/Bullock findings by state courts where state courts had not made such findings). The Mississippi Supreme Court's findings in

[2] The Eleventh Circuit panel here did not make such a finding itself, nor could it have on the basis of this record.

Bullock went far beyond what the Florida Supreme Court wrote in Mr. Smith's case. However, even the Mississippi Supreme Court's language was not enough "to constitute a finding that Bullock killed, attempted to kill, or intended to kill . . ." Bullock, 474 U.S. at 389. Simply put, a state-court sufficiency determination is not an Edmund finding of fact. Bullock, 474 U.S. at 389-91. A state court sufficiency determination, however, is all that the Eleventh Circuit relied upon in Mr. Smith's case. This was contrary to the express holdings of Cabana v. Bullock and Tison v. Arizona.

The Eleventh Circuit's holding in Mr. Smith's case is contrary to Bullock and Tison and is in conflict with the decisions of other Circuit Courts of Appeal applying Bullock. Mr. Smith's case presents a substantial question, and certiorari review is proper.

2. The Eleventh Circuit's Affirmance of Petitioner's Conviction and Death Sentence Notwithstanding the Fact that the Trial Court Refused to Instruct the Jury on Petitioner's Sole Defense to the Capital Charges Is in Conflict With and Contrary to This Court's Decisions in In re Winship, 397 U.S. 358 (1970), Mullaney v. Wilbur, 421 U.S. 684 (1975), Beck v. Alabama, 447 U.S. 625 (1980), and Crane v. Kentucky, 106 S. Ct. 2142 (1986), Is Contrary To the Holdings of Other Courts of Appeal, and is in Conflict With the Fifth, Sixth, Eighth, and Fourteenth Amendments.

During his capital trial, Mr. Smith raised only one defense: that he withdrew from the offense before the decedent was murdered. This defense was well supported by the evidence, and was undeniably available under Florida law. The trial court, however, refused to provide the jury with any instruction whatsoever on Mr. Smith's defense. It thus directed the verdict for the prosecution on the sole issue raised by the evidence at trial, and left Mr. Smith defenseless. The Eleventh Circuit held that there was no due process violation, Smith v. Dugger, 840 F.2d at 791-92, contrary to this Court's precedents in Winship, Mullaney, Beck, Crane, and numerous other precedents. Certiorari

review is proper.

No direct evidence was elicited at trial establishing that Mr. Smith killed the decedent. Smith v. State, 424 So.2d 726, 731 (Fla. 1982). Mr. Smith's guilt therefore could only have been established under either an accomplice liability or a felony-murder theory. Smith v. State, supra, 424 So. 2d at 731-32.

On direct appeal, the Florida Supreme Court authoritatively explained that the defense of withdrawal was available under either of these theories:

> To establish the common-law defense of withdrawal from the crime of premeditated murder, a defendant must show that he abandoned and renounced his intention to kill the victim and that he clearly communicated his renunciation to his accomplices in sufficient time for them to consider abandoning the criminal plan...
>
> For a defendant whose liability is predicated upon the felony murder theory, the required showing is the same and the defense is available even after the underlying felony or felonies have been completed. Again the defendant would have to show renunciation of the impending murder and communication of his renunciation to his co-felons in sufficient time to allow them to consider refraining from the homicide.

Smith v. State, 424 So.2d 726, 732 (Fla. 1982)(citations omitted)(emphasis supplied). The Supreme Court then summarized the fundamental principles of the law of defenses and wrote:

> [A] defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions...
>
> If there is any evidence of withdrawal, an instruction should be given. The trial judge should not weigh the evidence for the purpose of determining whether the instruction is appropriate.

Smith v. State, 424 So. 2d at 732 (citations omiited) (emphasis supplied).[3]

Under these principles, the facts adduced at Mr. Smith's capital trial were more than sufficient to warrant an instruction on his defense of withdrawal, the only defense which counsel sought to present to the jury. Especially when taken in the

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[3] The Florida Supreme Court's opinion thus summarized Florida's standards for defense instructions and explained that these same principles applied to the defense of withdrawal. See, e.g., Davis v. State, 254 So.2d 221 (Fla. 3d DCA 1971) (alibi); Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981) (voluntary intoxication); Stinson v. State, 245 So.2d 688 (Fla. 1st DCA 1971) (justifiable homicide); Yohn v. State, 450 So.2d 901 (Fla. 1st DCA 1984) (insanity); Bryant v. State, 412 So.2d 347 (Fla. 1982) (withdrawal/independent acts); Laythe v. State, supra, 330 So.2d 113 (withdrawal).

Florida recognizes, as do the federal courts, that an evidentiary foundation for a defense instruction may be established by any evidence adduced at trial. Compare Mellins v. State, 395 So.2d 1207, 1209 (Fla. 4th DCA 1981) (instruction required when defense "suggested" by cross-examination), and Edwards v. State, 428 So.2d 358, 358-59 (Fla. 3d DCA 1983) (same); with United States v. Stulga, 531 F.2d 1377, 1379-80 (6th Cir. 1976) (evidentiary foundation for defense instruction arising solely from accomplice testimony presented by government); Perez v. United States, 297 F.2d 12, 15-16 (5th Cir. 1961); Strauss v. United States, 376 Ff.2d 416, 419 (5th Cir. 1967).

Moreover, like the federal courts, Florida law demands that trial courts not weigh the evidence, and not impose their perception of the defense in deciding whether the charge is appropriate. Compare, Laythe v. State, supra, 330 So.2d at 114; Taylor v. State, 410 So.2d 1358, 1359 (Fla. 1st DCA 1982) (Defendant entitled to requested instruction regardless of weakness or improbability of evidence adduced in its support); with United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976) ("Even when the supporting evidence is weak or of doubtful credibility its presence requires an instruction on the theory of defense."); Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951); Strauss v. United States, 376 F.2d 416 (5th Cir. 1967).

Significantly, the Florida standard mandates that the trial court evaluate the sufficiency of the evidence in the light most favorable to the defendant when determining whether to charge on a proffered defense theory. Bolin v. State, 297 So.2d 317, 319 (Fla. 3d DCA), cert. denied, 304 So.2d 452 (Fla. 1974). Florida courts have therefore often found fundamental error in the failure to clearly present the defense and the state's burden to the jury. See Mellins v. State, supra 395 So.2d at 1209 (voluntary intoxication defense negates intent element in specific intent offense; thus, failure to instruct on defense cannot constitute harmless error); Edwards v. State, supra 428 So.2d at 358-59; Bryant v. State, supra, 412 So.2d at 349-50; cf. State v. Jones, 377 So.2d 1163 (Fla. 1979) (failure to instruct on underlying felony in felony murder case).

light most favorable to Mr. Smith, Bolin v. State, supra, 297 So.2d at 319, the evidence established much more than "any evidence" supporting an instruction on Mr. Smith's theory of defense. Smith v. State, supra, 424 So.2d at 731-32; Bryant v. State, supra, 412 So.2d at 349-50; Laythe v. State, supra, 330 So.2d at 114.

The facts adduced at trial established two contrasting versions of the events of December 12 and 13, 1978. On the one hand, Mr. Smith's pretrial statements presented a version of the events which admitted complicity in the underlying felonies, but established that he effectively withdrew from the offense before the homicide occurred. On the other hand, and in stark contrast, the testimony of accomplice Victor Hall presented a version of the events implicating Mr. Smith in the underlying felonies and thus in the homicide. These two versions of the events were the core of the evidence adduced at trial. No other direct evidence was elicited respecting the events in question.

The State presented the testimony of thirty witnesses. The defense, aware that Mr. Smith's pretrial statements would be introduced, established its defense from the evidence elicited in the State's case-in-chief and from cross-examination of the State's witnesses. The defense did not challenge the underlying offenses of robbery, kidnapping, and sexual battery. The central and only issue presented by the defense, and by the facts elicited, was whether Mr. Smith withdrew from the crime before the decedent was killed.

Mr. Smith's pretrial statements were elicited on direct and cross-examination through the testimony of four law enforcement officers (ROA 2297-2327, 2161-68, 2273, 2277-78, 2313-14, 2318-19). In all of his statements, Mr. Smith consistently denied that he intended to kill the decedent (ROA 2299-2300, 2318-19), and continually recounted his efforts to convince co-defendant Johnny Copeland not to kill her (ROA 2266-68, 2272-73, 2300,

2319).

On December 18, 1978, Mr. Smith provided law enforcement officers with a statement fully detailing the events of December 12th. Mr. Smith made clear to law enforcement officers that his December 18th statement would be a truthful account of the events (ROA 2274-74, 2312). Mr. Smith admitted his involvement in the robbery, abduction and sexual battery (ROA 2281-82, 2302-03, 2319-20); he then explained that it was Johnny Copeland who decided to kill the decedent and that he actively tried to persuade Copeland not to kill her once he discerned Copeland's intention. Mr. Smith's statement was substantial evidence of his efforts to stop Copeland from killing the victim (ROA 2266-68, 2272-73, 2300, 2313-14, 2318-20). Nevertheless, Copeland would not be persuaded and did kill her (R. 2320-21).

Specifically, Mr. Smith consistently maintained that Sheila Porter should not be killed, and actively resisted Copeland's intention to kill her (ROA 2266-68, 2272-73, 2319-20). Mr. Smith "renounced" his participation (ROA 2318-20, 2272-73, 2266-68), and "communicated" his renunciation to Copeland both at the motel where a sexual battery occurred (ROA 2266) and at Tram Road (where Copeland killed Ms. Porter) before the killing occurred (ROA 2267-68, passim) all in an effort to persuade Copeland not to kill her.

Copeland had the pistol at the scene of the homicide (ROA 2268). Mr. Smith sought to convince Copeland that he should not kill the girl; he told Copeland "just to give her money back" (ROA 2268, 2313-14), and to leave her alone (ROA 2313-14), and to "take the girl back" (ROA 2314). Copeland, however, would not be dissuaded.

In short, the evidence was more than sufficient to establish that Mr. Smith renounced and abandoned his involvement in the offense once he discerned Copeland's intention, and that he communicated that renunciation to Copeland expressly for the

purpose of persuading him that he should not kill the decedent (ROA 2266-68, 2272-73, 2313-14, 2318-20). The evidence was thus amply sufficient to warrant an instruction on the defense of withdrawal, Mr. Smith's sole defense.

Mr. Smith's account was corroborated by much of the other evidence adduced at trial. Copeland was seen by other witnesses using a gun (ROA 2509-13) of the type used in the murder (ROA 2509-13, 2545-50). Records of a K-Mart store established that ammunition of the same brand that was used in the homicide was purchased shortly before the offense by Johnny Copeland (ROA 2326). Florence Smith, Copeland's girlfriend, testified that when the police came to arrest Copeland, she concealed a small black pistol under the front seat of his car (ROA 2505). Following the arrest, she gave the pistol to his mother. Moreover, both Mr. Smith's and Victor Hall's account revealed that Johnny Copeland was the moving force on the evening of December 12th (ROA 2356, 2361-62, 2320, 2468-69, 2306-07).

Accomplice Victor Hall had entered a cooperation agreement with the State pursuant to which he would receive a life sentence in exchange for testimony against Mr. Smith. Hall's version of the events of December 12th differed from Mr. Smith's on the key issue at trial -- Mr. Smith's withdrawal from the offense before Sheila Porter was killed.

Hall, however, specifically testified that he did not know who killed the decedent (ROA 2379). Moreover, there was evidence that Hall told Mr. Smith's grandmother that Mr. Smith had not killed Sheila Porter (ROA 2450). On cross-examination, Victor Hall admitted that Mr. Smith had asked if they wanted to call off the robbery (ROA 2405-06). He also stated that it was Copeland who had acquired the bullets for the gun (ROA 2406) and had threatened Sheila Porter in the motel room (ROA 2407) and that Mr. Smith had not spoken with her while she was in the car (ROA 2407). Finally, Hall admitted that he did not know what happened

in the woods off Tram Road (ROA 2404).

Hall was significantly impeached by his own inconsistent statements (ROA 2401-02, 2413, 2418-22, 2429-30, 2431-50, 2469), and his plans with Copeland, while awaiting trial, to provide false testimony against Mr. Smith (ROA 2380-86, 2388, 2424-29, 2463, 2470). Moreover, Hall was also significantly impeached through his status as an accomplice who was cooperating due to his fear of a death sentence (ROA 2317, et seq.; 2337-38, 2344, 2354-79, 2397, passim).

As discussed above, the withdrawal defense was available to Mr. Smith. Smith v. State, supra, 424 So. 2d at 732. To warrant an instruction on withdrawal, Mr. Smith had to make a showing of: (1) renunciation of the impending murder or abandonment of an intention to kill; and (2) communication of the renunciation in sufficient time for co-felons to consider refraining from killing the decedent. 424 So. 2d at 732. Mr. Smith did just that.

Mr. Smith adduced ample evidence demonstrating that he abandoned and renounced participation in the impending murder of the decedent and that he communicated his renunciation in sufficient time for Copeland to abandon the criminal plan (ROA 2266-68, 2272-73, 2313-14, 2318-20). Substantially more than "any evidence" was elicited to support an instruction on the withdrawal defense under either the felony-murder or accomplice liability theories. See, Laythe, supra; Bryant, supra; Motley v. State, supra, 20 So. 2d 798 (Fla. 1945).

The only evidence which contradicted Mr. Smith's account was the version testified to by accomplice Victor Hall. Even if a trial court were permitted to weigh evidence in deciding whether to instruct on a theory of defense, Victor Hall's testimony was by no means enough to refute Mr. Smith's account. Cf. United States v. Curry, 471 F. 2d 419 (5th Cir. 1973) (accomplice testimony is to be received with suspicion); Phelps v. United States, 252 F. 2d 49 (5th Cir. 1958) (accomplice testimony

requires skeptical approach); see generally, Turner v. State, 452 A.2d 416 (Md. 1982) (accomplice testimony presumed untrustworthy). The credibility and degree of culpability determinations were for a properly instructed jury to make. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988).

Moreover, since the defense had admitted the underlying acts, the trial court's refusal to instruct on withdrawal precluded any verdict but guilty on the offense of felony-murder. In fact, the thrust of the prosecutor's summation to the jury was that irrespective of the credibility of Victor Hall's testimony, Mr. Smith had admitted complicity on the underlying felonies and had thus admitted guilt to felony-murder. Yet, Mr. Smith had admitted no such thing. His defense was that he had abandoned and renounced participation in the murder. In refusing to instruct the jury on this defense, the trial court directed a verdict of guilt on the sole issue raised by the evidence.

Similarly, the jury was directed to find Mr. Smith guilty under the court's accomplice liability instructions. Mr. Smith had admitted complicity in the underlying felonies; thus, the jury could well have used those felonies to find that Mr. Smith "incited, caused, encouraged, assisted or induced" Johnny Copeland. Since the instructions failed to even suggest to the jury that Mr. Smith could have abandoned and renounced his participation in the murder, even after the underlying felonies were completed, cf. Smith v. State, 424 So.2d at 732, the jury was directed to find Mr. Smith guilty.

The jurors' obvious reservations about Mr. Smith's complicity in the murder, stated on the record (ROA 2711-13), were thus rendered insignificant.

Finally, the trial court instructed the jury that the withdrawal defense was available solely to the offense of attempted murder (ROA 2682); the trial court thus clearly signalled the jury that, under the law as given by the judge, no

withdrawal defense was available to the offense of murder.

In sum, during his capital trial Mr. Smith presented only one defense, his withdrawal from the offense. Since he elicited more than sufficient evidence supporting his requested withdrawal charge, he was entitled to an instruction on his sole defense. Bolin v. State, supra 297 So. 2d at 319; Laythe v. State, supra 330 So. 2d at 114; Bryant v. State, supra; see also, United States v. Garner, supra 529 F.2d at 970.

A criminal defendant's due process right to a conviction resting solely upon proof of his guilt beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970), requires the trial court to adequately charge the jury on a defense which is timely requested and supported by the evidence. See United States ex rel. Means v. Solem, 646 F.2d 322 (8th Cir. 1980); Zemina v. Solem, 438 F.Supp. 455 (S.D. South Dakota, 1977), affirmed, 573 F.2d 1027 (8th Cir. 1978). See also, United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976); Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967); Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951); Perez v. United States, 297 F.2d 12, 13-14 (5th Cir. 1961); United States v. Lofton, 776 F.2d 918 (10th Cir. 1985). The Eleventh Circuit panel's determination is in conflict with the determinations of these other federal Courts of Appeal.

The due process right to a theory of defense instruction is rooted in a criminal defendant's right to present a defense. As this Court explained in a similar context,

> "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' California v. Trombetta, 467 U.S. [479], at 485 [1984]. . .
>
> We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard."

Crane v. Kentucky, 106 S.Ct. 2142, 2146 (1986) (emphasis supplied), citing, inter alia, Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967); In re Oliver, 333 U.S. 257 (1948).

The failure to adequately instruct on a theory of defense is undeniably an error, one of constitutional magnitude, warranting habeas corpus relief. See, e.g., United States ex rel. Means v. Solem, supra, 646 F.2d 322; Zemina v. Solem, supra, 573 F.2d 1027; see also, United States ex rel. Reed v. Lane, 759 F.2d 618 (7th Cir. 1985); United States ex rel. Collins v. Blodgett, 513 F.Supp. 1056 (D. Montana, 1981); cf. Dawson v. Cowan, 531 F.2d 1374 (1976).

Mr. Smith's conviction was derived from such a constitutionally defective proceeding, for the trial court's refusal to instruct left Mr. Smith defenseless, see, Crane, supra, and relieved the State of its burden to prove his guilt. By taking the withdrawal issue from the jury's province, the trial court effectively directed a verdict for the State on the sole issue raised by the evidence, see, Rose v. Clark, 106 S.Ct. 3101, 3106 (1986); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977), and deprived Mr. Smith of his right "to raise a reasonable doubt in the jurors' minds." Zemina v. Solem, supra, 438 F.Supp. at 470 (S.D. South Dakota 1977), affirmed, 573 F.2d 1027 (8th Cir. 1978). The trial court therefore violated Mr. Smith's fundamental right to have the state put to its burden, In re Winship, supra, and to have the jury determine whether that burden had been met. In not instructing the jury on the defense of withdrawal the court effectively

> creat[ed] an artificial barrier to the consideration of relevant ... testimony ... [and] the trial judge reduced the level of proof necessary for the [state] to carry its burden.

Cool v. United States, 409 U.S. 98, 104 (1972).

In Mullaney v. Wilbur, 421 U.S. 684 (1975), this Court held that jury instructions which shifted the burden of persuasion on an essential element of an offense unconstitutionally relieved the State of the burden to prove guilt beyond a reasonable doubt. Following Mullaney, numerous courts have found errors of

constitutional magnitude when criminal defendants were forced to bear the ultimate burden on an element of the offense, as defined by state law. See Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980); Tennon v. Ricketts, 642 F.2d 161 (5th Cir. Unit B, 1981); Wynn v. Mahoney, 600 F.2d 448 (4th Cir. 1979); cf. Sandstrom v. Montana, 442 U.S. 521 (1979). However, the constitutional principles established by Mullaney permit the State to ask that criminal defendants come forward with some evidence of a defense negating an element of the crime, before the burden shifts to the state to disprove that defense beyond a reasonable doubt. Mullaney, supra, at 701-03; Simopoulos v. Virginia, 103 S.Ct. 2532, 2535 (1983).

Florida's law of defenses follows this approach. Under Florida law, once evidence is presented which tends to support a defense, the burden shifts to the State to disprove the defense beyond a reasonable doubt. See, Yohn v. State, 450 So.2d 898, 900-01 (Fla. 1st DCA 1984); Bolin v. State, 297 So.2d 317 (Fla. 3 DCA, 1974). Although a specific instruction on the State's burden to disprove the defense may not be required, the instructions, taken as a whole, must fairly present the jury with the theory of defense and the State's burden to prove guilt beyond a reasonable doubt. See Yohn, supra, 450 So. 2d at 900-01; Holmes v. State, 374 So.2d 944 (Fla. 1979), cert. denied, 446 U.S. 913 (1980), rehearing denied, 448 U.S. 910 (1980); Spanish v. State, 45 So.2d 753 (Fla. 1950); Bolin, supra; McDaniel v. State, 179 So.2d 576 (Fla. DCA 1965). The State is therefore required to prove that a defense does not raise a reasonable doubt. See Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1983) (voluntary intoxication); State v. Bobbitt, 389 So.2d 1094, 1098 (Fla. 1st DCA 1980) (self-defense); McCray v. State, 483 So.2d 5 (Fla. 4th DCA 1983) (entrapment); Bryant v. State, 412 So.2d 350 (Fla. 1982) (withdrawal); Yohn v. State, supra (insanity). In short, when the defense meets its burden of production, and

thereby establishes the defense as a material issue, the State must disprove the defense in order to establish the elements of the offense. See, e.g., Graham v. State, 406 So.2d 503 (Fla. 3d DCA 1981).

The trial court's refusal to provide an instruction on Mr. Smith's sole defense therefore denied him his right to a conviction resting on proof of his guilt beyond a reasonable doubt on the offense as defined by state law, i.e., under the State's burden to disprove his defense. See Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968); Holloway v. McElroy, supra; Mullaney v. Wilbur, supra; cf. In re Winship, 397 U.S. 358 (1970).

Furthermore, under the Due Process Clause, "the State may not place the burden of persuasion ... upon the defendant if the truth of the 'defense' would necessarily negate an essential element of the crime charged." Holloway v. McElroy, 632 F.2d at 625. The trial court did more than place the ultimate burden on Mr. Smith. It took from the state any burden at all on that issue. Thus, if the withdrawal defense negated any elements of the offense of murder, under either of the two theories of liability involved in this case (accomplice liability or felony murder), Mr. Smith has established a clear abrogation of his constitutional rights.

As noted, the Florida Supreme Court determined that Mr. Smith's conviction could only have been based on either an accomplice liability or felony murder theory. Smith v. State, supra, 424 So.2d at 732. Under the accomplice theory, the elements of the offense which the state was required to establish were that Mr. Smith, 1) aided, abetted, counseled, hired, or otherwise procured, Smith v. State, supra, 424 So.2d at 731; Fla. Stat. Section 777.011 (1977); 2) the unlawful killing of a human being perpetrated from a premeditated design to effect the death of the person killed. Fla. Stat. Section 782.04(1). Under the

felony-murder theory, the elements of the offense which the state was required to establish were that Mr. Smith was 1) engaged in the perpetration of, or in the attempt to perpetrate, 2) one of the underlying felonies of Fla. Stat. Section 782.04(2) when the murder occurred. Section 782.04(2) (emphasis supplied). The state's burden was to prove each of these elements beyond a reasonable doubt.

The withdrawal defense effectively negated crucial elements of the offense under either theory. Under the accomplice theory, the defense of withdrawal was antithetical to each element. Once Mr. Smith asserted his defense of withdrawal, he challenged the specific intent necessary to establish "aiding and abetting" and accomplice liability intent. When he elicited evidence on his proffered theory, he effectively met his burden of production on the material issue of his specific intent. See, Graham v. State, 406 So.2d 503, 504 (Fla. 3d DCA 1981); Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1983); see also, Wynn v. Mahoney, 600 F.2d 448, 450-51 (4th Cir. 1979); Holloway v. McElroy, supra; Moody v. State, 359 So.2d 557 (Fla. 4th DCA, 1978). The burden then shifted to the State to establish specific intent beyond a reasonable doubt by disproving the proffered defense of withdrawal. See Mullaney v. Wilbur, supra; Wynn v. Mahoney, supra; Holloway v. McElroy, supra; Clark v. Louisiana State Penitentiary, 697 F.2d 699, 700-01 (5th Cir. 1983) (on rehearing); Clark v. Jago, 676 F.2d 1099, 1104 (6th Cir. 1982). In short, when Mr. Smith withdrew, he no longer possessed the intent to "aid and abet" nor was he any longer "aiding and abetting."

Under the felony-murder theory, the withdrawal defense was antithetical to the assertion that Mr. Smith was "engaged in the perpetration of, or in the attempt to perpetrate" an enumerated felony when the murder occurred. Fla. Stat. Section 782.04(2). Once Mr. Smith adduced evidence that he withdrew from the

offense, he met his burden of production on the material issue of whether he was any longer "engaged in the perpetration" of a listed felony when the decedent was killed. If Mr. Smith effectively withdrew, he was no longer engaged in a felony, and therefore no longer liable for felony-murder. The burden therefore shifted to the State to prove felony-murder by disproving his defense of withdrawal beyond a reasonable doubt. See Holloway v. McElroy, supra; Stump v. Bennett, supra; Cf. Gutherie v. Maryland State Penitentiary, 683 F.2d 820, 826 (4th Cir. 1983); Mellins v. State, supra, 395 So.2d at 1209-10. The withdrawal could come about even after the underlying felonies were completed. Smith v. State, 424 So.2d at 732. As the Florida Supreme Court explained in Bryant v. State,

> Since it is the commission of a homicide in conjunction with intent to commit the felony which supplants the requirement of premeditation for first-degree murder, ... there must be some causal connection between the homicide and the felony.

412 So.2d 347, 350 (1982) (citations omitted). In the instant case, the defense of withdrawal negated that "causal connection." Thus, only if the State bore the burden of proving beyond a reasonable doubt that Mr. Smith did not withdraw from the offense, could his conviction meet the due process standards of Mullaney and In re Winship.

This burden was never met, because the trial court removed those issues from the jury's consideration. In effect, the trial court created more than a presumption of guilt on those elements, Sandstrom v. Montana, supra, 442 U.S. at 526, it directed the verdict for the State. Long-established constitutional precedent, however is clear that "a trial judge is prohibited from . . . directing the jury to come forward with [a verdict of guilty] . . . regardless of how overwhelmingly the evidence may point in that direction." Rose v. Clark, supra, 106 S.Ct. at 3106, citing United States v. Martin Linen Supply Co., 430 U.S.

564, 572-73 (1977). The trial court relieved the State of its burden of proof.

In Beck v. Alabama, 447 U.S. 625 (1980), this Court held that a sentence of death may not be constitutionally imposed when the jury is not permitted to consider a verdict of guilt on a lesser-included, non-capital offense. The court reasoned that the failure to give an instruction on a lesser included offense enhances the risk of an unwarranted conviction and, where a defendant's life is at stake, such a risk cannot be tolerated. Id. at 637; see also Anderson v. State, 276 So.2d 17, 18 (Fla. 1973). The necessity for such instructions is predicated upon the greater reliability requirements demanded by the Court in capital proceedings. See Beck, supra; see also Gardner v. Florida, 430 U.S. 349 (1977).

In this case, with ample evidence supporting a withdrawal instruction, the trial judge's failure to instruct violated the principles of Beck v. Alabama. See Hopper v. Evans, 456 U.S. 605 (1982) (lesser-included offense instructions mandated when some supporting evidence is elicited). An instruction on withdrawal would have allowed the jury to convict on the lesser included felonies while finding Mr. Smith not guilty on the murder charge. Consequently, Mr. Smith was denied his due process right to a reliable verdict in a capital case. Beck v. Alabama, supra; Hopper v. Evans, supra; see also Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982).

In the context of the heightened reliability requirements mandated in capital cases, Gardner v. Florida, supra, 430 U.S. at 357-58 (opinion of Stevens, J.); Woodson v. North Carolina, 428 U.S. 280 (1976), the failure to present the jury at Mr. Smith's trial with an instruction on his sole defense, although he adduced sufficient evidence to warrant the charge, demonstrates that this question warrants certiorari review.

In its opinion on Mr. Smith's direct appeal the Florida

Supreme ruled that the failure to instruct on Mr. Smith's sole defense to the capital charge was harmless error because:

> Appellant's pretrial statement, . . . testified to by a state witness, seems hardly sufficient to raise the issue of withdrawal ... Without formulating any general harmless error rule regarding improper denial of instructions on defenses, we hold the error, if any was harmless.

Smith v. State, 424 So.2d at 732.

The Florida Supreme Court's conclusion was erroneous in light of the discussion presented herein and in the Smith opinion itself. That conclusion is not binding on this Court since the question of whether evidence is sufficient to warrant a proffered defense instruction is a question of law, not fact. See United States ex rel. Means v. Solem, 646 F.2d 322, 331 & n.5 (8th Cir. 1980) (state court's finding that there was "no evidence" to support instructions on defense theories is a conclusion of law, not presumptively valid on federal habeas corpus review); Zemina v. Solem, 438 F.Supp. 455, 467-68 (D.C. South Dakota 1977), affirmed, 573 F.2d 1027 (8th Cir. 1978); see also Jackson v. Virginia, 443 U.S. 307 (1979); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981); cf. Brown v. Allen, 344 U.S. 443, 506 (1953) ("ultimate decisions of federal law remain[] in the federal courts.") It is in fact hard to decipher why the state can rely on a criminal defendant's statements to try to prove guilt, while the criminal defendant cannot rely on his pretrial statements to law enforcement, presented by the state at trial, in an effort to show lack of guilt and to request a theory of defense instruction on the basis thereof. But that was the state high court's ruling in this case.

Moreover, the trial court's error cannot be considered "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, reh. denied, 386 U.S. 987 (1967). This Court has explained that harmless-error analysis would be inapplicable to a case in which a court "directed a verdict for the prosecution in

a criminal trial by jury." Ross v. Clark, supra, 106 S.Ct. at 3106; see also, United States v. Goetz, 746 F.2d 705, 708-09 (11th Cir. 1984) (trial judge cannot direct verdict in favor of government, and such action cannot be viewed as harmless error); United States ex rel. Means v. Solem, supra. As discussed above, the trial court's actions here resulted in the verdict being directed for the state at Mr. Smith's capital trial. Such actions cannot be considered harmless error. Ross v. Clark, supra; Goetz, supra.

Even if traditional harmless error analysis were applicable, the trial court's error could not be considered harmless beyond a reasonable doubt. The evidence was by no means overwhelming. In fact, the evidence presented one strongly contested and crucial issue for the jury's resolution: whether to believe Mr. Smith's account that he withdrew from the offense before the killing occurred, or the State's accomplice testimony of Victor Hall that he did not. The trial court removed this critical factual issue from its rightful place in the jury's consideration, and thus deprived Mr. Smith of his only defense. The trial court's instructions that the State must prove guilt beyond a reasonable doubt were therefore devoid of meaning. See Sandstrom v. Montana, 442 U.S. 510, 518-19 n.7 (1979); Cool v. United States, 409 U.S. 100, 105 (1972).

> Of the instructions given [by the court], none relate[d] to [Frank Smith's] theory of [defense]. And the instructions given... [did] little to bring [Frank Smith's] theory before the jury.

United States ex rel. Means v. Solem, 646 F.2d at 333.

The trial court deprived Mr. Smith of his basic due process right to have the prosecution prove guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, supra. The absence of the proffered defense charge "may well have influenced the jury in reaching a verdict of guilty of murder in the first degree." Ross v. Reed, 704 F.2d 705, 707

(4th Cir. 1983), affirmed, Reed v. Ross, 104 S.Ct. 2901 (1984). The trial court's failure to instruct created the "substantial risk" that the jury was denied the opportunity to entertain a reasonable doubt. Clark v. Jago, 676 F.2d 1099, 1105 (6th Cir. 1982). The trial court permitted the jury to convict Mr. Smith although the jurors may never have examined all the evidence concerning the elements of the crimes charged. Connecticut v. Johnson, 103 S.Ct. 969, 978 (1983). These deprivations of Mr. Smith's fundamental constitutional rights cannot be "harmless beyond a reasonable doubt." Chapman v. California, supra.

The Eleventh Circuit denied relief holding that "[t]he record reveals no evidence on Smith's withdrawal from the underlying felonies" and thus that the trial court's refusal to provide counsel's proposed instruction was harmless. Smith, 840 F.2d at 792. Ample evidence that Mr. Smith withdrew before the murder itself occurred, however, was adduced at trial; the evidence was more than sufficient to support an instruction on that issue. In fact, the Florida Supreme Court authoritatively wrote in Mr. Smith's case itself that as a matter of Florida law, a defendant is entitled to an instruction on the defense of withdrawal from the homicide even though the withdrawal does not occur until after the underlying felonies are completed. Smith, supra, 424 So. 2d at 731-32.

The claim is not defeated by the fact that counsel's proposed instruction may have had some deficiencies: Florida law has never so constrained such issues to the specific language of a defense attorney's proposed instruction, and the Florida Supreme Court did not so constrain the issue in Mr. Smith's case. See Smith v. State, 424 So. 2d 726, 731-32 (Fla. 1982). Under Florida law, if the defendant's request (i) clearly suggests to the trial judge the need for an instruction, (ii) on an issue that is critical to the defense, and (iii) when that issue is not covered by standard jury instructions, a proper instruction must

be given by the court, irrespective of the language of the requested instruction. See generally, Wilson v. State, 344 So. 2d 1315, 1317 (Fla. 2d DCA 1977); Bacon v. State, 346 So. 2d 629, 631 (Fla. 2d DCA 1977); Williams v. State, 366 So. 2d 817, 819 (Fla. 3d DCA 1979); cf. Smith v. State, supra, 424 So. 2d at 731-32. Mr. Smith met those standards.

The failure to provide an instruction on Mr. Smith's sole defense to the capital charges denied him a fundamentally fair trial and capital sentencing determination. Because of the substantial conflicts identified herein, and because of the significance of this issue, certiorari review is proper, and we respectfully urge that this Honorable Court issue its Writ of Certiorari.

3. The Decision Below Allowing Mr. Smith's Sentence of Death to Stand Notwithstanding the Fact that the Trial Judge's Penalty Phase Jury Instructions Shifted the Burden to Mr. Smith to Prove that Death Was Not Appropriate and Limited Full Consideration of Mitigating Circumstances to Those Which Outweighed Aggravating Circumstances is in Conflict With and Contrary to this Court's Decisions in Mullaney v. Wilbur, 421 U.S. 684 (1975), Lockett v. Ohio, 438 U.S. 586 (1978), Penry v. Lynaugh, 109 S. Ct. 2934 (1989), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Mills v. Maryland, 108 S. Ct. 1860 (1988), and is in Conflict With the Ninth Circuit's Decision in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(In Banc)

This issue has troubled members of this Court in the past, see Smith v. North Carolina, 459 U.S. 1056 (1983)(Stevens, J., respecting the denial of the petitions for writ of certiorari), and is troubling members of this Court now. See Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989); Boyde v. California, 109 S. Ct. 2447 (1989); Walton v. Arizona, 110 S. Ct. 49 (1989). This important constitutional claim should be properly heard and determined in Mr. Smith's case, for the sentencing proceedings herein at issue were fundamentally erroneous under the eighth amendment. With the Eleventh Circuit's decision in petitioner's

case providing a conflict with the Ninth Circuit's decision in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc), and with this Court's decisions in Mills v. Maryland, Lockett, Penry, and Hitchcock, it is more than appropriate for this Court to consider the significant constitutional questions involved herein.

Seven cases are now pending before this Court involving very similar questions. See Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989); Boyde v. California, 109 S. Ct. 2447 (1989); Walton v. Arizona, 110 S. Ct. 49 (1989); Hamblen v. Dugger, No. 89-5121 (1989); Kennedy v. Dugger, No. 89-5990 (1989); Tompkins v. Florida, No. 89-6166 (1989). Three of these cases involve Florida capital post-conviction litigants. Hamblen; Kennedy; Tompkins. Petitioner respectfully urges that this Court should also grant certiorari review in this case, particularly in light of the fact that the standards by which issues such as the instant are to be properly, finally assessed by the state and federal courts are now about to be determined by this Court.

The trial court instructed the jury at the sentencing phase that its verdict respecting the penalty to be imposed had to be based on its "finding of whether sufficient aggravating circumstances exist[ed] and whether sufficient mitigating circumstances exist[ed] which outweigh[ed] any aggravating circumstances found to exist." (R. 2768) (emphasis supplied). In their entirety, the trial court's instructions at the penalty

phase had the effect of shifting to Mr. Smith the burden of persuasion on the issue of whether he should live or die.[4]

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[4]In the past, members of the Florida Supreme Court had explained the origin of the presumption employed in this case and how that presumption was sometimes improperly construed by trial courts:

> Justice McDonald of the Florida Supreme Court has astutely pointed out the problems created when such a presumption is relied upon by the sentencing authority:
>
> > I would also like to comment on the reference in the majority opinion to State v. Dixon, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943 [94 S.Ct. 1950, 40 L.Ed.2d 295] (1974). I do not embrace the language from that opinion recited in this majority opinion as "when one or more of the aggravating circumstances is found death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances." If that language is restricted to the role of this Court in reviewing death sentences imposed by the trial court, it is acceptable. But I fear that it is construed by the trial judges as a directive to impose the death penalty if an aggravating factor exists that is not clearly overridden by a statutory mitigating factor. The death sentence is proper in many cases. But it is the most severe and final penalty of all and should, in my judgment, be exercised with extreme care. I am unwilling to say that a trial judge should presume death to be the proper sentence simply because a statutory aggravating factor exists that has not been overcome by a mitigating factor.
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> Randolph v. State, No. 54-869 (Fla. Nov. 10, 1983)(LEXIS, States library, Fla. file) (McDonald, J., dissenting), withdrawn, 463 So.2d 186 (Fla. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 656 (1985).
>
> Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment.

Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988)(emphasis added). The presumption was never intended as a standard for the jury or judge in evaluating the appropriateness of death. To apply it there is to eviscerate the requirement that a capital sentencing decision be individualized and reliable. But that is where the presumption was applied in this case. The state and lower federal courts, however, declined to take corrective action.

Such instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). In Adamson, the Ninth Circuit held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable sentencing determination:

> We also hold A.R.S. sec. 13-703 unconstitutional on its face, to the extent that it imposes a presumption of death on the defendant. Under the statute, once any single statutory aggravating circumstance has been established, the defendant must not only establish the existence of a mitigating circumstance, but must also bear the risk of nonpersuasion that any mitigating circumstance will not outweigh the aggravating circumstance(s). See Gretzler 135 Ariz. at 54, 659 P.2d at 13 (A.R.S. sec. 13-703(E) requires that court find mitigating circumstances outweigh aggravating circumstances in order to impose life sentence). The relevant clause in the statute--"sufficiently substantial to call for leniency"--thus imposes a presumption of death once the court has found the existence of any single statutory aggravating circumstance.

Recently, the Eleventh Circuit held in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), that a presumption of death violates the Eighth Amendment. The trial judge, applying Florida's death penalty statute, had instructed the jury to presume that death was to be recommended as the appropriate penalty if the mitigating circumstances did not outweigh the aggravating circumstances. Examining the jury instructions, the Eleventh Circuit held that a presumption that death is the appropriate sentence impermissibly "tilts the scales by which the [sentencer] is to balance aggravating and mitigating circumstances in favor of the state." Id. at 1474. The court further held that a presumption of death "if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment." Id. at 1473.

The Constitution "requires consideration of the character and record of the individual offender and the circumstances of the particular offense," Woodson, 428 U.S. at 304, because the punishment of death is "unique in its severity and irrevocability," Gregg, 428 U.S. at 187, and because there is "fundamental respect for humanity underlying the Eighth Amendment." Woodson, 428 U.S. at 304 (citation omitted). A defendant facing the possibility of death has the right to an assessment of the appropriateness of death as a penalty for the crime the person was convicted of. Thus, the Supreme Court has held that statutory schemes which lack an individualized evaluation, thereby functioning to impose a mandatory death penalty, are unconstitutional. See, e.g., Sumner v. Shuman, 107 S.Ct. 2716, 2723 (1987); Roberts, 428 U.S. at 332-33; see also Poulos, Mandatory Capital Punishment, 28 Ariz. L. Rev. at 232 ("In simple terms, the cruel and unusual punishments clause requires individualized sentencing for capital punishment, and mandatory death penalty statutes by definition reject that very idea.").

In addition to precluding individualized sentencing, a presumption of death conflicts with the requirement that a sentencer have discretion when faced with the ultimate determination of what constitutes the appropriate penalty. See Comment, Deadly Mistakes: Harmless Error in Capital Sentencing, 54 U. Chi. L. Rev. 740, 754 (1987)("The sentencer's authority to dispense mercy . . . ensures that the punishment fits the individual circumstances of the case and reflects society's interests.").

Arizona Revised Statute sec. 13-703(E) reads, in relevant part: "the court . . . shall impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Thus, the Arizona statute presumes that death is the appropriate penalty unless the defendant can sufficiently overcome this presumption with mitigating evidence. In imposing this presumption, the statute precludes the individualized sentencing required by the Constitution. It also removes the sentencing judge's discretion by requiring the judge to sentence the defendant to death if the defendant fails to establish mitigating circumstances by the requisite evidentiary standard, which outweigh the aggravating circumstances. See Arizona v. Rumsey, 467 U.S. 203, 210 (1984)("death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency"); State v. Jordan, 137 Ariz. 504, 508, 672 P.2d 169, 173

(1983)("Jordan III")(sec. 13-703 requires the death penalty if no mitigating circumstances exist).

The State relies on the holdings of its courts that the statute's assignment of the burden of proof does not violate the Constitution. The Arizona Supreme Court reasons that "[o]nce the defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring the defendant to establish mitigating circumstances." Richmond, 136 Ariz. at 316, 666 P.2d at 61. Yet this reasoning falls short of the real issue--that is, whether the presumption in favor of death that arises from requiring that the defendant prove that mitigating circumstances outweigh aggravating circumstances, offends federal due process by effectively mandating death.

In addition, while acknowledging that A.R.S. sec. 13-703 places the burden on the defendant to prove the existence of mitigating circumstances which would show that person's situation merits leniency, State v. Poland, 144 Ariz. 388, 406, 698 P.2d 183, 201 (1985) aff'd, 476 U.S. 147 (1986), the State suggests that its statute does not violate the Eighth Amendment because subsection (E) requires the court to balance the aggravating against the mitigating circumstances before it may conclude that death is the appropriate penalty. While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. This is because in situations where the mitigating and aggravating circumstances are in balance, or, where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death and thus precludes the individualized sentencing required by the Constitution. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence, and we note that "[p]resumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect." Jackson, 837 F.2d at 1474 (citing Francis and Sandstrom).

> Thus, we hold that the Arizona statute, which imposes a presumption of death, is unconstitutional as a matter of law.

Adamson, supra, 865 F.2d at 1041-44 (footnotes omitted)(emphasis in original).

What occurred in Adamson is precisely what occurred in Mr. Smith's case. The instructions violated the eighth and

fourteenth amendments, Mullaney v. Wilbur, 421 U.S. 684 (1975), Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988). The burden of proof was shifted to Mr. Smith on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Smith's due process and eighth amendment rights. See Mullaney, supra. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Moreover, the application of that unconstitutional standard at the sentencing phase violated Mr. Smith's rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Adamson, supra; Jackson, supra. The instructions plainly shifted to Mr. Smith the burden to prove that he should receive a life sentence.[5] But "presumptive" death sentences have been long condemned by this Court. See Woodson v. North Carolina, 428 U.S. 280 (1976); Sumner v. Shuman, 107 S. Ct. 2716 (1987).[6] The burden-shifting instructions also

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[5]The Constitution simply does not permit presumptive death sentences and does not permit requiring the defendant to establish that mitigation outweighs aggravation, i.e., to establish that life is the appropriate sentence. Due process and the eighth amendment require the State to establish that death is the appropriate sentence, i.e., that aggravation outweighs mitigation. If any presumption is to be employed in capital sentencing, that presumption should be the same as is employed in every other setting where liberty, property, or life are at stake -- that the defendant is presumed innocent (of the sentence in this case) until the State establishes otherwise. The procedure employed to sentence Mr. Smith to death presumed death appropriate once any aggravating factor was established, and thus rendered the case in mitigation of sentence a nullity. Cf. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989).

[6]Presumptive death sentences are unconstitutional because "the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a [sentence less than death]." Shuman, supra, 107 S. Ct. at 2727. A capital defendant must be allowed to present any evidence regarding his or her character and background and the circumstances of the offense which calls for a sentence less than death, Lockett v.

(footnote continued on following page)

unconstitutionally restricted the jurors' ability to "fully consider" and "give effect to" the mitigating factors before them. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). They thus violated the eighth amendment's mandate that any capital sentencing decision be individualized and reliable.

This Court recently granted a writ of certiorari in Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989), to review a very similar claim. The question presented in Blystone has obvious ramifications here. Under Pennsylvania law, the jury is instructed that where it finds an aggravating circumstance present and no mitigation is presented, it "must" impose death. However, if mitigation is found then the jury must decide whether the aggravating circumstances outweigh the mitigating. Thus, under Pennsylvania law, the legislature chose to place upon a

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Ohio, 438 U.S. 586 (1978), and a capital sentencer must be able to "full[y] consider[]" and "give effect to" that evidence. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982). When a capital sentencer's view of the law or procedure to be followed in determining the sentence does not provide for "full consideration" or for "giv[ing] effect to" mitigating evidence, the sentencing process does not conform to the eighth amendment. Penry; Lockett; Hitchcock; Eddings; Mills v. Maryland, 108 S. Ct. 1860 (1988).

This is precisely the effect which resulted from the burden-shifting presumption applied in Mr. Smith's case. In instructing that the mitigating circumstances must outweigh aggravating circumstances before the jurors could impose life, the judge effectively told the jury that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. This jury was thus constrained in its consideration of mitigating evidence. Hitchcock; Penry, supra; Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). The procedure followed in this case did not allow for a "reasoned moral response" to the issues at Mr. Smith's sentencing or permit the jurors to "fully" consider and "give effect to" the mitigation. Penry, supra. The Eleventh Circuit's decision is in conflict with Adamson, Mills, Lockett, Eddings, Penry, Woodson, and Hitchcock, supra. Certiorari review should be granted. Indeed, the pendency of Blystone v. Pennsylvania, supra, Walton v. Arizona, supra, and Boyde v. California, supra, demonstrates that certiorari review in Mr. Smith's case would be more than appropriate.

capital defendant a burden of production as to evidence of mitigation and a burden of persuasion as to whether mitigation exists. However, once evidence of a mitigating circumstance is found then the state bears the burden of persuasion as to whether the aggravating circumstances outweigh the mitigating circumstances such that a death sentence should be returned.

Under Florida law, and specifically under the presumption employed here, once one of the statutory aggravating circumstances is found, by definition sufficient aggravation exists to impose death. Here, the jury was instructed in such a way as to make it clear that the defendant had the burden of production and the burden of persuasion of the existence of mitigation, and then the burden of persuasion as to whether the mitigation outweighs the aggravation. Certainly, the standard used here allows for a far less reliable and individualized capital sentencing determination than the Pennsylvania statute at issue in Blystone. It is beyond dispute that "presumptive" death sentences are unconstitutional under the eighth amendment. See Woodson v. North Carolina, supra; Sumner v. Shuman, supra. Certainly Blystone will address that question. Certiorari review in Mr. Smith's case is proper.

As noted, certiorari has also been granted recently in the case of Boyde v. California, 109 S. Ct. 2447 (1989), in which this Court will review whether it is appropriate for a capital sentencer to employ a standard that if aggravating circumstances outweigh mitigating circumstances, the sentencer "shall" impose a sentence of death. The question in Boyde is whether such a standard constrains a capital sentencer's discretion to impose life or constrains the sentencer's ability to fully consider evidence in mitigation. The question therein presented is obviously similar to the question raised by Mr. Smith herein, as is the question at issue in Walton v. Arizona, supra.

Indeed, the presumption employed in Mr. Smith's case is a

more egregious abrogation of eighth amendment individualized sentencing principles than the standards at issue in Blystone, Walton, and Boyde. In this case, the sentencers were led to believe that they were required to impose death once an aggravating circumstance was established and to believe mitigation could only be fully considered if it was "sufficient" to outweigh aggravation. Cf. Penry, supra. This rendered this sentence of death violative of the eighth amendment requirement that such a sentence be individualized and reliable.

Another case which should affect proper resolution of Petitioner's case is Saffle v. Parks, 109 S. Ct. 1930 (1989). The question presented in Parks concerns whether the sentencer must understand that sympathy for the defendant may be considered at the penalty phase. See Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988)(in banc). In Petitioner's case, the sentencing jury was led to believe that mitigation had to outweigh aggravation before it could be "fully" considered and given effect. Penry, supra. There is nothing in the instructions which would signal a reasonable juror to understand that she or he could grant a life sentence solely based on the sympathy resulting from the "totality of the circumstances," Dixon v. State, 283 So. 2d 1, 10 (Fla. 1973), considered, regardless of whether mitigation outweighed aggravation.

The presumption applied in Mr. Smith's case effectively barred the jurors from considering the mitigation that was present before them. This flies in the face of eighth amendment jurisprudence. See Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Lockett v. Ohio, 438 U.S. 586 (1978). The eighth amendment requires an individualized assessment of the appropriateness of the death penalty. Lockett, supra; Penry, supra. Petitioner was denied an individualized and reliable capital sentencing determination because only the mitigation which outweighed the aggravation was to be given "full" consideration. See Penry,

supra.

Most recently, this Court addressed a related issue in Penry v. Lynaugh, 109 S. Ct. 2934 (1989), and reaffirmed the principles previously enunciated in Lockett and Eddings v. Oklahoma, 455 U.S. 104 (1982):

> In Eddings v. Oklahoma, 455 U.S. 104 (1982), a majority of the Court reaffirmed that a sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death. In Eddings, the Oklahoma death penalty statute permitted the defendant to introduce evidence of any mitigating circumstance but the sentencing judge concluded, as a matter of law, that he was unable to consider mitigating evidence of the youthful defendant's troubled family history, beatings by a harsh father, and emotional disturbance. Applying Lockett, we held that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id., at 113-114 (emphasis in original). In that case, "it was as if the trial judge had instructed a jury to disregard the mitigating evidence [the defendant] proffered on his behalf." Id., at 114.
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> * * * *
>
> Moreover, Eddings makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Hitchcock v. Dugger, 481 U.S. 393 (1987). Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence. Woodson, 428 U.S., at 304, 305. "Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime." California v. Brown, supra, at 545 (concurring opinion)(emphasis in original).

Penry, supra, 109 S. Ct. at 2946-47.

It is not sufficient that a capital defendant be allowed to introduce evidence in support of mitigating circumstances: "[t]he sentencer must also be able to consider and give effect to that evidence in imposing sentence." Penry, supra, 109 S. Ct. at

2951. The jury here, however, was instructed that death was presumptively the proper penalty unless the mitigation outweighed the aggravation. Under Florida law, however, a capital sentencing jury can impose life whenever the mitigation provides a "reasonable basis" for determining that a sentence of less than death is warranted. Hall v. State, 541 So. 2d 1125 (Fla. 1989). Thus, the jury here could have imposed life, but could not but have thought themselves precluded from doing so by the presumption placed upon Petitioner.

The effects feared in Adamson are precisely the effects resulting from the burden-shifting presumption applied in Petitioner's case. In being led to understand that mitigating circumstances must outweigh aggravating circumstances before they could render a verdict for life, the jury was effectively informed that once aggravating circumstances were established, they need not consider any mitigating circumstances which did not outweigh the aggravating circumstances. This jury was thus constrained in its consideration of mitigating evidence, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Penry, supra, and from evaluating the "totality of the circumstances," Dixon, supra, 283 So. 2d at 10, in determining the appropriate penalty. The jurors were effectively not allowed to make a "reasoned moral response" to the issues at Mr. Smith's sentencing or to "fully" consider and "give effect" to mitigation. Penry, supra. There is a "substantial possibility" that this understanding by the jury resulted in a death sentence despite factors calling for life. Mills v. Maryland, 108 S. Ct. 1860 (1988).[7]

The focus of a jury instruction claim is on "what a reasonable juror could have understood the charge as meaning."

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[7]It is clear that this Court will soon address whether under the eighth amendment it is proper to have a mechanical capital sentencing proceeding which relied upon a presumption of death test when such a test precludes individualized

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Francis v. Franklin, 471 U.S. 307 (1985); see also Sandstrom v. Montana, 442 U.S. 510 (1979). Here, a reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time understanding, based on the instructions, that Mr. Smith had the ultimate burden to prove that life was appropriate.

However, the application of a presumption of death violates the eighth amendment:

> Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985). When such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state.
>
> It is now clear that the state cannot restrict the mitigating evidence to be considered by the sentencing authority. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982);
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> Lockett v. Ohio, 438 U.S. 586 (1978). . . . Rather than follow Florida's scheme of balancing aggravating and mitigating circumstances as described in Proffitt [v. Florida, 428 U.S. 242, 258 (1976)], the trial judge instructed the jury in such a manner as virtually to assure a sentence of death. A mandatory death penalty is constitutionally impermissible. Woodson v. North Carolina, 428 U.S. 280 (1976); see also State v. Watson, 423 So. 2d 1130 (La. 1982) (instructions which informed jury that they must return recommendation of death upon finding aggravating circumstances held unconstitutional). Similarly, the instruction given is so skewed in favor of death that it fails to channel the jury's sentencing discretion appropriately. Cf. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (sentencing authority's discretion must "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

Jackson v. Dugger, 837 F.2d 1469, 1474 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988).

The rules derived from Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2854 (1978), "are now well established . . . ." Skipper v. South Carolina, 476 U.S. 1, 4 (1986). See also Hitchcock v. Dugger, 107 S. Ct 1821 (1987). These rules require that the sentencer:

a. "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," Lockett v. Ohio, 438 U.S. at 604 (emphasis in original);

b. not be permitted to "exclud[e] such evidence from [his or her] consideration," Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); and

c. not be "prevent[ed] . . . from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation," Lockett v. Ohio, 438 U.S. at 605.

Mills v. Maryland, 108 S. Ct. 1860 (1988), presents the proper analysis. There, the Court focused on the special danger that an improper understanding of jury instructions in a capital sentencing proceeding could result in a failure to consider factors calling for a life sentence:

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty

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consideration and prevents the sentencer from making a "reasoned moral response" to mitigating evidence. Cf. Penry, supra. In light of Penry, Lockett, Hitchcock, and Eddings, there should be little doubt that that question is very significant, and that certiorari review in Mr. Smith's case would be more than appropriate.

> [when the jury's weighing process is distorted by an improper instruction]. It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114.

Mills, supra, 108 S. Ct. at 1865 (footnotes omitted).

In Mills, the Court concluded that, in the capital sentencing context, "the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g., Yates v. United States, 354 U.S. 298, 312 (1957); Stromberg v. California, 283 U.S. 359, 367-368 (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., Lockett v. Ohio, 438 U.S., at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); Andres v. United States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of [section] 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"); accord, Zant v. Stephens, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

Mills, supra, 108 S. Ct. at 1866-67 (footnotes omitted). Thus under Mills the question must be: could reasonable jurors have

read the instructions as calling for a presumption of death which shifted the burden to the defendant and deprived him of an individualized sentencing under Lockett, Eddings, Skipper, and Hitchcock, supra? The answer to that question in Mr. Smith's case must be "yes". This burden shifting denied Mr. Smith the individualized consideration of mitigating factors which Lockett, Eddings, and Penry v. Lynaugh require. The jurors were not allowed to "fully" and independently "give effect" to the mitigating factors which were reflected in the record and which may have established a "reasonable basis" for a recommendation of life. See Tedder v. State, 322 So. 2d 908 (Fla. 1975); Mann v. Dugger, 844 F.2d 1446, 1450-51 (11th Cir. 1988)(in banc).

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Florida law additionally requires the jury to weigh the aggravating circumstances against mitigating evidence. This sets Mr. Smith's case apart from the situation in Zant v. Stephens, 462 U.S. 862 (1983). The Florida Supreme Court has produced considerable case law concerning the import of instructional error to a jury regarding the mitigation it may consider and balance against the aggravating circumstances. This case law demonstrates that instructional error before a Florida sentencing jury renders the resulting

death sentence fundamentally unreliable. See Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).[8]

In Mr. Smith's case the jury received no guidance as to the proper standard applicable to their evaluation of the evidence -- whether there existed a "reasonable basis" for reaching a verdict of life. Hall, supra. In Florida, the jury's pivotal role in the capital sentencing process requires its sentencing discretion to be channeled and limited through accurate instructions.[9] The failure to provide Mr. Smith's sentencing jury the proper "channeling and limiting" instructions violated the eighth amendment.

Under Florida's standards, a jury's decision to recommend life does not require that the jury reasonably conclude that the mitigating circumstances outweighed the aggravating. In fact, under Tedder and its progeny, a jury recommendation of life may

[8]In Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988), the court ordered a new sentencing because the jury had not received an instruction explaining that mitigation was not limited to the statutory mitigating factors. The instructional error was found to require resentencing before a properly instructed jury notwithstanding the fact that at a previous resentencing to the judge alone the judge himself was not limited to the statutory mitigating factors. Similar conclusions have been reached in other cases where the jury was erroneously instructed. Meeks v. Dugger, 548 So. 2d 184, 187 (Fla. 1989)("Had the jury recommended a life sentence, the trial court may have been required to conform its sentencing decision to Tedder v. State, 322 So. 2d 908 (Fla. 1975), which requires that, if there is a reasonable basis for the recommendation, the trial court is bound by it."); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation."); Floyd v. State, 497 So. 2d 1211, 1216 (Fla. 1986)("In view of the inadequate and confusing jury instructions, we believe Floyd was denied his right to an advisory opinion. We cannot sanction a practice which gives no guidance to the jury for considering circumstances which might mitigate against death.").

[9]A Florida jury's verdict of life cannot be overridden if there is a "reasonable basis" for that recommendation. See Mann v. Dugger, 844 F.2d 1446, 1450-55 (11th Cir. 1988)(in banc)(and state case law analyzed therein). The statutory mitigation and nonstatutory mitigation in the record was plainly enough to establish such a "reasonable basis" in Mr. Smith's case. Cochran v. State, 547 So. 2d 928 (Fla. 1989).

not be overridden if there is a "reasonable basis" discernible from the record for that recommendation, regardless of the number of aggravating circumstances, and regardless of whether the mitigation "outweighs" the aggravation. See, e.g., Perry v. State, 507 So. 2d 1373 (Fla. 1987)(override reversed irrespective of presence of five aggravating circumstances); Hawkins v. State, 436 So. 2d 44 (Fla. 1983)(same). Thus the instruction not only violated Mullaney and Adamson, but it was not an accurate statement of Florida law. These errors undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Smith. The jury never learned that it could recommend life if it had a reasonable basis for doing so. Cf. Hall v. State, supra, 541 So. 2d 1125.

Mr. Smith's death sentence is unreliable, and is founded upon instructions which "precluded" and hindered the jury's full and proper consideration of mitigating facts. Cf. Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). Certiorari review in order for the Court to assess this claim in conjunction with the Court's forthcoming decisions in Elvatone, Boyde, Walton, and Parks would be more than proper. Accordingly, given the pendency of Elvatone, Boyde, Walton, and Parks, and the Eleventh Circuit's erroneous disposition of this claim, a disposition which is in conflict with Adamson, Mills, Lockett, Eddings, Penry, Woodson, and Hitchcock, supra, this Court should grant Mr. Smith's petition for a writ of certiorari to resolve the fundamental conflicts identified herein.

CONCLUSION

Based on the foregoing, Petitioner respectfully prays that this Honorable Court issue its Writ of Certiorari in order to review the substantial and important federal constitutional issues outlined above, and in order to resolve the fundamental conflicts among courts identified herein. Resolution of the

issues discussed herein will have a real and direct bearing on whether Petitioner lives or dies. Resolution of these issues will also have a real effect on the cases of other death sentenced Florida inmates. This Court has granted certiorari review in the past under similar circumstances. Given the importance of these claims to capital inmates in Florida, and in this case to the question of whether Mr. Smith will live or die, it is respectfully urged that certiorari review in this case would be appropriate. We therefore respectfully pray that the Court grant certiorari review in this action.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
Chief Assistant CCR

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
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(904) 487-4376

By: _____
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 26th day of December, 1989.

_____
Attorney

ATTACHMENT 1

er to protest the exclusion, and the reasons for the exclusion.

AFFIRMED in part and REMANDED.

AFM CORPORATION, a Florida corporation, Plaintiff-Appellee,

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, a New York corporation, Defendant-Appellant.

No. 85-5714.

United States Court of Appeals, Eleventh Circuit.

March 4, 1988.

Stephen B. Gillman, Shutts & Bowen, Richard M. Leslie, Miami, Fla., for defendant-appellant.

Christopher Lynch, Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, Chief Judge, HENDERSON *, Senior Circuit Judge, and ATKINS **, Senior District Judge.

PER CURIAM:

The facts of this case are set out in the original panel decision certifying three questions of law to the Supreme Court of Florida pursuant to Rule 9.150, Florida Rules of Appellate Procedure. *AFM Corp. v. Southern Bell Telephone and Telegraph Corp.*, 798 F.2d 1487 (11th Cir. 1986). We certified the following three questions:

(1) Can a plaintiff suing exclusively in tort recover lost profits?

If the answer to question 1 is yes,

(2) Can negligent or willful breach of a contract alone constitute an independent tort?

If the answer to question 2 is yes,

(3) Can such a tort be the basis of an award of punitive damages if the other criteria for awarding punitive damages are met?

The Supreme Court of Florida restated these issues into the following question:

Does Florida permit a purchaser of services to recover economic losses in tort without a claim for personal injury or property damage?

The court then answered the restated question in the negative. *AFM Corp. v. Southern Bell Telephone and Telegraph*, 515 So.2d 180 (Fla.1987). Accordingly, the district court's judgment must be

REVERSED.

Frank SMITH, Petitioner-Appellant,

v.

Richard L. DUGGER, et al.,* Respondents-Appellees.

No. 86-3333.

United States Court of Appeals, Eleventh Circuit.

March 9, 1988.

Murder defendant, sentenced to death, petitioned for writ of habeas corpus. The United States District Court for Northern District of Florida, No. TCA-84-7355-WS, William Stafford, Chief Judge, denied relief, and defendant appealed. The Court of Appeals, Roney, Chief Judge, held that: (1) defendant was not entitled to instruction on withdrawal defense; (2) defendant's pretrial statements were admissible; (3) defendant was not denied effective assistance of counsel; and (4) procedural default barred consideration of sentencing phase claims.

Affirmed.

1. **Habeas Corpus** ⇐45.3(4)

If murder defendant's constitutionally based issue was raised on direct appeal, it was necessarily ruled on, whether state court explicitly addressed it or not, and it would be available in federal habeas corpus case as exhausted claim; if it could have been raised, but was not, however, it would be barred from federal review.

2. **Constitutional Law** ⇐268(11)
Criminal Law ⇐772(4)

Failure to give felony-murder defendant's requested withdrawal instruction did not violate his right to due process where there was no evidence that defendant withdrew from underlying felonies. U.S.C.A. Const.Amends. 5, 14.

3. **Homicide** ⇐334

Imposition of death sentence was sufficiently supported by evidence that felony-murder defendant was individually culpable in murder of victim.

4. **Criminal Law** ⇐412.2(4)

Murder defendant's statement that he did not have attorney, "but I plan to get one," was insufficient to constitute request for attorney such as would warrant exclusion of statements subsequently made during interrogation. U.S.C.A. Const.Amend. 6.

5. **Criminal Law** ⇐412.2(4)

Even if murder defendant manifested request for counsel, his postarraignment statements to police were nevertheless admissible where evidence affirmatively demonstrated that each statement was initiated by him and not by police. U.S.C.A. Const. Amend. 6.

6. **Criminal Law** ⇐412.2(3)

Murder defendant's lack of knowledge of attorney's attempts to reach him during course of prearraignment interrogation was irrelevant to defendant's knowing and voluntary waiver of his right to counsel. U.S.C.A. Const.Amend. 6.

7. **Criminal Law** ⇐641.13(7)

Counsel's failure to present evidence of mitigating circumstances during penalty phase of capital murder prosecution did not render his assistance ineffective, and such failure was strategic decision. U.S.C.A. Const.Amend. 6.

8. **Criminal Law** ⇐641.13(7)

Counsel's failure to seek instruction on withdrawal at sentencing phase of capital murder prosecution did not render his assistance ineffective where jury instructions reflected counsel's alternative argument that defendant's participation in murder was minor compared to that of coperpetrator. U.S.C.A. Const.Amend. 6.

9. **Habeas Corpus** ⇐90.3(3)

Habeas corpus petitioner was not entitled to second evidentiary hearing on his ineffectiveness claim, on ground that he did not have adequate time to investigate and present his claim in state court, absent showing of what evidence petitioner would present at such hearing beyond affidavits he filed in state court. U.S.C.A. Const. Amend. 6.

10. **Habeas Corpus** ⇐65.3(1.20)

Supreme Court of Florida is consistent in its application of contemporaneous objection and procedural default rules in capital cases, such that rules are adequate procedural bar to consideration of issues in federal court.

11. **Constitutional Law** ⇐270(2)
Criminal Law ⇐1213.5(2)

Statistical studies regarding race as factor in decisions to impose death sentence were insufficient to demonstrate unconstitutional discrimination under Fourteenth Amendment, or to show irrational-

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

* The caption has been altered pursuant to Fed.R. App.P. 43(c) to reflect succession of Richard L. Dugger, to Secretary, Florida Department of Offender Rehabilitation; Tom Barton, to Superintendent of Florida State Prison, Starke, Florida; and Robert A. Butterworth, to Attorney General of the State of Florida.

ty, arbitrariness or capriciousness under Eighth Amendment, with regard to death sentence imposed upon felony-murder defendant. U.S.C.A. Const.Amends. 8, 14.

Billy H. Nolas, Office of Capital Collateral Representative, Tallahassee, Fla., Sandra Sonenberg, Public Defender Service for Dist. of Columbia, Washington, D.C., for petitioner-appellant.

Lawrence A. Kaden, Asst. Atty. Gen., Patricia Conners, Dept. of Legal Affairs, State of Fla., Tallahassee, Fla., for respondents-appellees.

Appeal from the United States District Court for the Northern District of Florida.

Before RONEY, Chief Judge, HATCHETT and EDMONDSON, Circuit Judges.

RONEY, Chief Judge:

Defendant-Petitioner Frank Smith, sentenced to death in Florida for first-degree murder, appeals a district court order denying him federal habeas corpus relief. Smith raises the following six arguments on appeal:

(1) his right to a fair trial was abrogated by the trial court's refusal to instruct the jury as to his withdrawal defense to murder;

(2) his death sentence constitutes cruel and unusual punishment because the state court failed to make a finding on his individual culpability;

(3) his pre-trial statements were taken in violation of his Sixth Amendment right to counsel;

(4) he did not receive effective assistance of counsel at the penalty phase of his capital trial;

(5) the sentencing proceedings were unreliable and fundamentally flawed; and

(6) he is entitled to an evidentiary hearing on his claim that race was used as a factor in the decision to sentence him to death.

There being no showing of a violation of Smith's constitutional rights, we affirm.

Smith was charged, along with co-defendants Johnny Copeland and Victor Hall, with robbery, kidnapping, sexual battery and first-degree murder, based on events occurring on the evening of December 12, 1978. On that date, Smith and his two accomplices robbed a convenience store in Wakulla County, Florida, abducted the store clerk, Sheila Porter, and took her to a motel where they committed sexual battery upon her. Smith's accomplice, Victor Hall, testified that the three men later drove Sheila Porter to a wooded area. There, Hall waited in the car while Smith and Johnny Copeland took her into the woods. Hall testified that he heard three gunshots, and when Copeland and Smith returned to the car, Smith was carrying a gun. They left without Sheila Porter. Two days later, her body was found with three bullet wounds in the back of her head.

Found guilty of first-degree murder as well as the other charges, Smith was sentenced to death in accordance with the jury recommendation. The Florida Supreme Court affirmed Smith's convictions and death sentence on direct appeal. *Smith v. State*, 424 So.2d 726 (Fla.), *cert. denied*, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983).[1] The Governor of Florida denied Smith clemency and signed a warrant scheduling his execution. Smith then filed motions in the state court, seeking a stay of execution and post-conviction relief pursuant to Fla.R.Crim.P. 3.850. Both the trial court and the Florida Supreme Court

1. On direct appeal, Smith raised the following claims: (1) the filing of a second indictment was improper and untimely; (2) the court erred in admitting into evidence certain pre-trial statements; (3) the court erred in admitting evidence of collateral crimes; (4) the court erred in denying his requested instruction on the defense of withdrawal; (5) the imposition of the death sentence in this case violated *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); and (6) the court improperly interpreted and applied the statutory aggravating factors in sentencing Smith to death. *Smith v. State*, 424 So.2d 726 (Fla.), *cert. denied*, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983).

refused to grant a stay and denied Smith's 3.850 motion. *Smith v. State*, 457 So.2d 1380 (Fla.1984).[2]

Smith filed a petition for writ of habeas corpus in federal district court raising eighteen different claims[3] and Smith's execution was stayed to allow time for consideration of the petition. The district court held that ten of Smith's claims were procedurally barred, denied the remaining eight claims on the merits without an evidentiary hearing and granted a certificate of probable cause.[4]

2. Smith's motion under Rule 3.850 raised the following issues: (1) that jurors were improperly excused for cause due to their opposition to capital punishment and that, even if they were properly excused, death qualifying the jury deprived Smith of a trial by a jury drawn from a representative cross-section of the community; (2) that the jury instruction given on the process of weighing aggravating and mitigating circumstances placed the burden on the defendant to prove that death was not the appropriate penalty; (3) that the State at trial was improperly allowed to bolster the credibility of its principal witness before the defense had attempted to impeach him, violating Smith's right of confrontation; (4) that the trial court erred in refusing to instruct the jury on the defense of withdrawal; (5) that the giving of jury instructions on all lesser degrees of homicide, attempted murder and felony murder is a practice conducive to arbitrariness in violation of the Eighth Amendment; (6) that instructing the jury on all the statutory aggravating circumstances was improper; (7) that the trial court erroneously instructed the jury that its decision to recommend either life or death would have to be made by a majority vote; (8) that the trial court's instruction on mitigating circumstances limited the jury's consideration to statutory mitigating circumstances and that the court also limited its consideration of mitigating circumstances; (9) that Smith did not receive effective assistance of counsel at trial; and (10) that Smith's sentence of death was a product of systematic racial discrimination in capital sentencing. Smith also filed a petition for writ of habeas corpus in the Florida Supreme Court, raising the issue of ineffective assistance of counsel on appeal. *Smith v. State*, 457 So.2d 1380 (Fla.1984).

3. The following fifteen claims were listed in Smith's original petition: (1) improper admission of Smith's pre-trial statements; (2) jury instructions allowed for the death penalty to be imposed absent a jury finding that Smith actually killed or intended to kill; (3) refusal to instruct on the proffered defense of withdrawal; (4) impermissible excusal for cause of jurors with conscientious objections to the death penalty; (5) violation of Smith's constitutional right to a jury comprised of a fair cross-section of the community; (6) impermissible bolstering by the State of its own key witness before he had been impeached; (7) incorrect application of aggravating circumstances; (8) blanket instructions on all lesser included offenses at the guilt/innocence phase influenced outcome at penalty phase; (9) blanket instructions on aggravating circumstances wrongly given; (10) consideration of non-statutory mitigating circumstances precluded; (11) unconstitutional burden shifting at the penalty phase; (12) incorrect instruction at the sentencing phase respecting the jury vote; (13) race used as a factor in the decision to put Smith to death; (14) denial of an evidentiary hearing on the issue of racial discrimination; and (15) ineffective assistance of counsel at sentencing. Smith later supplemented his petition with three additional claims: (1) ineffective assistance on direct appeal; (2) improper consideration of ex parte information by Florida Supreme Court; and (3) inadequate notice of amended indictment.

4. The district court found that the following issues were not cognizable due to procedural default: (1) that jurors were improperly excused for cause due to their objections to the death penalty; (2) that even if excusing jurors because of their objections to the death penalty was proper, excusal in this case deprived the petitioner of a jury drawn from a representative cross-section of the community; (3) that at trial, the State was improperly permitted to bolster the credibility of its witness in violation of Smith's right of confrontation; (4) that the Florida procedure which allows a jury charge on all lesser offenses was a violation of due process because it invites inevitably arbitrary results; (5) that it was error to instruct the jury on all the statutory aggravating circumstances regardless of whether there was support for them because it created the danger that the jury's advisory verdict was based on improper aggravating circumstances or that the jury applied the circumstances in an overbroad manner; (6) that the trial court improperly precluded consideration of non-statutory mitigating circumstances; (7) that the burden of proof was unconstitutionally shifted to petitioner during the penalty phase; (8) that the trial court erroneously instructed the jury that its decision to recommend either life or death would have to be made by a majority vote; (9) that the Florida Supreme Court improperly reviewed ex parte information about defendants in capital cases; and (10) that the trial court violated Smith's due process rights by refusing to instruct the jury on his withdrawal defense.

The court reached the merits of the following claims: (1) improper admission of certain pre-trial statements; (2) failure to instruct the jury that to impose the death penalty, it had to find that Smith actually killed or intended to kill; (3) overbroad application of four aggravating circumstances; (4) the death penalty in Florida is

Failure to Instruct on Withdrawal Defense

Smith asserts that the trial court violated his due process rights by refusing to give a requested instruction on his withdrawal defense. Smith objected to the failure to give the instruction at trial and raised the issue on direct appeal. The State asserts that procedural default bars this Court from consideration of the constitutional claim because Smith previously framed the issue on direct appeal in terms of state law, rather than federal constitutional law. The State argues that the Florida Supreme Court invoked its procedural default rules in refusing to address in the 3.850 appeal the merits of Smith's constitutionally-based jury instruction claim on the ground that the claim "either [was] or could have been presented on appeal...." *Smith v. State*, 457 So.2d 1380, 1381 (Fla.1984).

[1] The district court held there was a procedural default. The difficulty with the procedural default argument is found in the "was raised" or "could have been raised" dichotomy. If in fact the constitutionally-based jury instruction issue was raised on direct appeal, it was necessarily ruled on, whether the state court explicitly addressed it or not, and although foreclosed from state collateral attack, it would be available in the federal case as an exhausted claim. If it could have been raised, but was not, it would be barred from any state collateral review, and likewise barred from federal review. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

As far as the state court was concerned, it made no difference as a practical matter, whether the claim was barred on *res judicata* or procedural default grounds. To a federal court reviewing the case, however, it does make a difference. If the constitutional claim was made in the direct appeal, the failure of the state court to address it on direct appeal or in the 3.850 would not bar a review in federal court, either on default or exhaustion principles.

The question of Smith's preservation of his claim on direct appeal turns on whether the facts of the claim argued as state law error were sufficient to alert the state court of a constitutional issue. *Contrast Anderson v. Harless*, 459 U.S. 4, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (Petitioner's *Sandstrom* claim found to be unexhausted because jury instruction argument made on direct appeal relied solely on state law and broad constitutional argument that failure to properly instruct a jury violates the Sixth and Fourteenth Amendments) *with Hutchins v. Wainwright*, 715 F.2d 512, 519 (11th Cir.1983) (Objection on direct appeal to admissability of statements based on hearsay grounds sufficient to present constitutional confrontation clause claim to state court), *cert. denied*, 465 U.S. 1071, 104 S.Ct. 1427, 79 L.Ed.2d 751 (1984).

[2] We need not decide the procedural default issue here, however, because going to the merits it is apparent there is no substance to the constitutional claim. Smith argues that the due process right to a conviction based on proof of guilt beyond a reasonable doubt requires a trial court to charge the jury on a defense which is timely requested and supported by the evidence. Even if this argument is sound as a matter of principle, it avails Smith nothing because the instruction he now argues should have been given was never requested, and the evidence did not support the instruction he requested.

Smith sets forth his withdrawal defense claim in the following manner: *first*, he recites the constitutional underpinnings of the right to a theory of defense instruction; *second*, he notes that under Florida law, withdrawal is a defense to felony murder or to premeditated murder under an accomplice theory; and *third*, Smith asserts that there is ample evidence to support the defense in his pre-trial statements which were introduced by the State in its case-in-chief.

In these statements, Smith confessed to participating in the robbery and kidnapping, but maintained that he tried to talk his accomplice, Johnny Copeland, out of killing the victim.

At trial, Smith requested the following jury instruction for his withdrawal defense:

> Ladies and Gentlemen of the Jury, one of the defenses raised in this case is the defense of withdrawal.
>
> It is a valid defense to the charge of felony murder that the defendant withdrew from the commission of the felony upon which the felony murder charge is based before the death of the victim occurred. A party may withdraw from a criminal transaction and avoid criminal liability by communicating his withdrawal to the other parties in sufficient time for them to consider terminating their criminal plan and refraining from committing the contemplated crime.
>
> If you find from the evidence that the defendant withdrew from the offenses of robbery and kidnapping before the death of the victim then he is not criminally responsible for the death of the victim and you must find him not guilty of murder.
>
> If on the other hand you are convinced beyond a reasonable doubt that the defendant did not withdraw from the offenses of robbery and kidnapping, and you are otherwise convinced of his guilt beyond a reasonable doubt then you must find him guilty of first degree murder, or a lesser included offense.

This instruction refers to withdrawal only from the underlying felonies as a defense to felony murder. At trial, Smith never submitted or otherwise requested an instruction on withdrawal as a defense to premeditated murder under an accomplice theory.

Smith's felony murder charge was predicated on the offenses of kidnapping and robbery. In order for the jury to be charged with Smith's proposed instruction, Smith had to produce evidence that he withdrew from the kidnapping or the robbery before the victim's death. The record reveals no evidence on Smith's withdrawal from the underlying felonies. On the contrary, Smith admitted full participation in these offenses in his pre-trial statements introduced by the State.

There is no due process violation in the trial court's refusal to give the instruction in these circumstances.

Enmund Claim

In *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the United States Supreme Court held that the death penalty constituted cruel and unusual punishment when a defendant did not kill, attempt to kill, intend to kill or intend that lethal force be applied. Smith contends that, because the state courts never made a specific finding regarding his individual culpability in the murder of Sheila Porter, his death sentence is invalid under *Enmund*.

Two recent Supreme Court cases have limited and clarified *Enmund*. In *Tison v. Arizona*, — U.S. —, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), the Court held that a defendant who participates in a felony that results in murder may be sentenced to death constitutionally so long as his participation in the felony was major and his mental state was one of reckless indifference to the value of human life.

In *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), the Supreme Court determined that the requisite culpability finding should be made at some level in state court. The Court held that such a finding is entitled to a presumption of correctness in federal court, pursuant to 28 U.S.C.A. § 2254(d).

This trilogy of cases directs the federal courts to handle an *Enmund* claim by reviewing the record of the entire course of State proceedings to determine if a culpability finding has been made at some point. Such a review in this case leads us to reject Smith's *Enmund* claim.

In making a written finding in support of the imposition of the death penalty, the trial judge made the following statement:

> Both the Defendant Smith, and Co-Defendant Copeland, have claimed that it

administered in a racially discriminatory manner; (3) entitlement to an evidentiary hearing on race discrimination claim; (4) ineffective assistance of counsel during sentencing; (5) ineffective assistance of counsel on direct appeal; and (6) inadequate notice of superseding indictment.

was the other who was the major actor in the murder of Sheila Porter, but the evidence contradicts this. The evidence clearly shows that Smith and Copeland acted as equals and cohorts through the entire episode. They planned the robbery; together they carried out the robbery; together they kidnapped Sheila Porter; together they planned the rape and murder of Sheila Porter; together they raped her and murdered her. The evidence, including the testimony of Co-Defendant Victor Hall, ties these two defendants together in the murder of Sheila Porter.

Smith argues that this statement is not a legitimate finding on his culpability because the trial court relied on evidence gleaned from Johnny Copeland's trial, and by going outside the record in this manner, the trial court violated Smith's right to confrontation. We need not resolve the question of the adequacy of the trial court's finding because a review of the record indicates that the Florida Supreme Court also passed on the issue of Smith's culpability.

When Smith raised the *Enmund* issue on direct appeal, the Florida Supreme Court held that it was unnecessary to make the *Enmund* finding called for in felony murder cases because "here there was sufficient evidence from which the jury could have found appellant guilty of premeditated murder." *Smith v. State*, 424 So.2d 726, 733 (Fla.), *cert. denied*, 462 U.S. 1145, 103 S.Ct. 3139, 77 L.Ed.2d 1379 (1983). Implicit in this finding is the conclusion that Smith had the intent to kill. Smith's culpability has been properly examined in state court and found to be sufficient to justify imposition of the death penalty.

[3] Smith has raised nothing to overcome the presumption of correctness to which this finding is entitled under 28 U.S.C.A. § 2254(d). Indeed, there was sufficient evidence to support this finding. The evidence at trial revealed that before renting the motel room as well as during the time the co-defendants were actually executing Sheila Porter, Smith and Copeland discussed killing her. The two men were particularly concerned about Porter testifying against them. It was Victor Hall's testimony that both Copeland and Smith wanted to kill Porter, and when they drove to Tram Road and parked, Smith got out, pulled Porter from the car, and, along with Copeland led her into the woods by the arm. Subsequently, Hall heard three shots some two seconds apart and then saw Smith emerge from the woods with the gun in his hand.

The dictates of *Enmund* have been satisfied in this case.

Pre-Trial Statements

Smith argues that certain of his post-arraignment statements were improperly admitted at trial because they were obtained in violation of his Sixth Amendment right to counsel. Smith's claim is premised upon *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), which held that a defendant cannot be interrogated by police after requesting appointment of counsel at his arraignment unless the defendant initiates the interview.

A panel of this Court recently held that *Michigan v. Jackson* applied retroactively in a case where the challenged statements were introduced before the jury during the sentencing phase of the trial. *Fleming v. Kemp*, 837 F.2d 940 (11th Cir.1988). The question of the retroactivity of *Michigan v. Jackson* in cases where the statements were before the jury deciding guilt or innocence was reserved in *Fleming* and has not been decided by this Court. *See Collins v. Kemp*, 792 F.2d 987 (11th Cir.1986) (staying execution to allow briefing on issue of retroactivity of *Michigan v. Jackson*). We need not decide the issue in this case because, even if *Michigan v. Jackson* does apply, Smith has not established a violation of his Sixth Amendment right to counsel.

[4] The transcript of Smith's arraignment reveals that Smith in no way requested an attorney. Rather, after being informed of the charges against him and his *Miranda* rights, Smith stated that he did not have an attorney, "but I plan to get one." Thus, no attorney was appointed for Smith at his arraignment. The record indicates that Smith had consulted with an attorney prior to the arraignment, but Smith never officially retained this attorney or any other prior to the taking of his post-arraignment statements. Smith eventually submitted a motion for appointment of counsel on December 29, 1979.

[5] Assuming for the sake of argument that Smith manifested a request for counsel by his discussion with an attorney prior to his arraignment, *Michigan v. Jackson* is nevertheless inapplicable to this case. There the Supreme Court held that "if police *initiate interrogation* after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that *police-initiated interrogation* is invalid." *Michigan v. Jackson*, 475 U.S. at 636, 106 S.Ct. at 1411. (Emphasis added). The record of the suppression hearing held by the trial court affirmatively demonstrates that each of Smith's post-arraignment statements were initiated by him and not by the police.

Deputy Sheriff John Miller testified that while Smith was being transported to jail after his first appearance, Smith told Miller he should check K-Mart because that was where Johnny Copeland bought ammunition. Miller testified that he did not solicit that statement in any way. Miller said he also talked to Smith on December 16, the day after Smith's first appearance, and that Smith initiated a conversation and made other statements concerning the crime. Miller said he advised Smith of his *Miranda* rights prior to that conversation. Smith again requested to talk to Miller on December 17th. On December 18th, Smith signed a written waiver and again gave police further information concerning the crime.

The Supreme Court of Florida has previously held that Smith's waiver of his right to counsel during his post-arrest interviews was free and voluntary. *Smith v. State*, 424 So.2d 726, 730 (Fla.), *cert. denied*, 462 U.S. 1145, 103 S.Ct. 3139, 77 L.Ed.2d 1379 (1983). Nothing in the record indicates otherwise.

[6] In challenging the admissability of statements taken before his arraignment, Smith states that an attorney contacted by Smith prior to his arrest twice tried to reach him during the course of his pre-arraignment interrogation, but was turned away by police. The United States Supreme Court has held that a defendant's knowledge of an attorney's attempts to reach him is irrelevant to a knowing and voluntary waiver of the right to counsel. *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). *But see Haliburton v. State*, 514 So.2d 1063 (Fla.1987) (failure to inform a defendant that an attorney was present and wished to see him violated the due process clause of the Florida Constitution). Smith's constitutional challenge to the admissability of his pre-trial statements must fail.

Ineffective Assistance of Counsel at Penalty Phase

Smith contends that his trial counsel was constitutionally ineffective during the sentencing phase of his trial because counsel presented no evidence of mitigating circumstances during the sentencing hearing and failed to request a jury instruction on Smith's withdrawal defense during the sentencing hearing. Smith also contends that he has never received a full and fair hearing on either prong of his ineffectiveness claim.

To prevail on his claim of ineffectiveness, Smith must establish that his counsel's performance at the sentencing hearing was seriously deficient and that he suffered prejudice as a result of this deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The same standard for judging ineffective assistance claims applies to both guilt and sentencing phases of a capital trial. *Fitzpatrick v. Wainwright*, 772 F.2d 688, 698 (11th Cir.1985), *cert. denied*, 476 U.S. 1061, 106 S.Ct. 1842, 90 L.Ed.2d 949 (1986).

Smith alleges that the decision to forego presentation of such evidence was not tactical but rather was a function of counsel's failure to prepare for the hearing by investigating potential sources of mitigating evi-

dence. Smith points to a myriad of circumstances which could have been presented to the jury: his mental history; his physical health, including the fact that he was an epileptic; his history of drug and alcohol abuse; his difficult family background, and his incarceration in an adult prison at the age of fifteen. As further indicia of his counsel's ineffectiveness in not presenting mitigating evidence, Smith notes that his attorney has admitted that he felt limited to statutory mitigating factors even though Smith was tried and sentenced after *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

When a claim of ineffectiveness is based on an attorney's failure to present evidence of mitigating circumstances, this Court has rejected the argument that such a failure constitutes ineffective assistance *per se*. Recognizing that some so-called "mitigating" evidence can actually have a negative impact upon the jury, the Court has held that "the posture of a given case may well justify, if not require, an effective attorney to refrain from presenting such evidence." *Stanley v. Zant*, 697 F.2d 955, 961 (11th Cir.1983), *cert. denied*, 467 U.S. 1219, 104 S.Ct. 2967, 81 L.Ed.2d 372 (1984). Thus, while an attorney is required to conduct a "reasonable investigation" into possible mitigating evidence, *Elledge v. Dugger*, 823 F.2d 1439, 1456 (11th Cir.), *withdrawn in part on reh'g*, 833 F.2d 250 (11th Cir.1987), counsel may limit presentation of such evidence in the exercise of his reasonable strategic judgment. *Lightbourne v. Dugger*, 829 F.2d 1012, 1025 (11th Cir.1987). A tactical decision not to present mitigating evidence enjoys "a strong presumption of correctness which is virtually unchallengeable." *Clark v. Dugger*, 834 F.2d 1561 (11th Cir.1987). *See also Davis v. Kemp*, 829 F.2d 1022 (11th Cir.1987).

[7] Smith's trial attorney, Philip J. Padovano, testified at length during the evidentiary hearing held in state court on Smith's ineffectiveness claim. Padovano's testimony demonstrates that he conducted an extensive investigation into Smith's background and made a strategic decision to forego presentation of the mitigating evidence he uncovered.

Padovano testified that in preparing for the case, he spent months interviewing hundreds of potential witnesses, including Smith's sister and Smith's grandmother, who was primarily responsible for raising Smith. Through these interviews, Padovano learned of Smith's troubled childhood, his history of epileptic seizures and his incarceration in an adult prison at the age of fifteen.

Padovano also obtained the services of a licensed psychologist to determine whether Smith had any mental problems which might constitute mitigating factors. Tests performed by this psychologist revealed that Smith had no congenital or physiological defect, nor was he incompetent, insane or suffering from brain dysfunction.

Padovano explained his decision not to present mitigating evidence at the sentencing hearing in the following manner:

> [Smith's] degree of participation and his degree of responsibility was both a defense to the case and a reason to mitigate the penalty .... I couldn't go into Court and argue for four days that this man tried to withdraw from the felony; that he didn't want to do it; that he tried to stop Johnny Copeland. And then when the jury found him guilty, go up to the jury and say: Well, he did it, but he was a little sick. You can't do that. You can't have any credibility doing that kind of thing.

The strategic decision made by Padovano in this case is precisely the sort of decision which should not be second-guessed by a court reviewing an ineffectiveness claim. *Tafero v. Wainwright*, 796 F.2d 1314, 1320 (11th Cir.1986), *cert. denied*, — U.S. —, 107 S.Ct. 3277, 97 L.Ed.2d 782 (1987). As to Smith's charge that Padovano misapprehended the law as it pertained to the presentation of non-statutory mitigating factors, it is clear that Padovano's investigation went far beyond statutory mitigating factors, following his awareness of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *See Clark v. Dugger*, 834 F.2d 1561 (11th Cir.1987). Padovano was not constitutionally ineffective in his handling of potential mitigating evidence during Smith's sentencing hearing.

[8] As to the failure to request a jury instruction on Smith's defense of withdrawal at the sentencing phase, Padovano did make the argument at sentencing that Smith was not as culpable as Copeland and therefore the death penalty was too severe a punishment. The jury instructions included the statutory mitigating circumstance that the defendant's participation in the murder was minor compared to that of his co-perpetrator. In light of these facts, Padovano's failure to seek an instruction on withdrawal was not deficient performance.

[9] Smith contends that he is entitled to a second evidentiary hearing on his ineffectiveness claim because, due to time constraints, he did not have an opportunity to adequately investigate and present his claim in state court. This allegation is based on the fact that the evidentiary hearing held in state court was scheduled within a week of Smith's obtaining counsel for the collateral proceedings. Smith has not demonstrated, however, what evidence he would present at such a hearing beyond the affidavits he filed in state court. The transcript of the hearing indicates that Padovano was extensively examined by Smith. The hearing in state court was full, fair and adequate; Smith is therefore not entitled to evidentiary hearing in federal court.

Sentencing Proceedings

Smith contends that his sentencing hearing was unreliable and fundamentally flawed because: (1) the trial court limited consideration of non-statutory mitigating factors; (2) the trial court instructed the jury that its decision to recommend life or death had to be by majority vote; (3) the trial court's instruction on the weighing of statutory and mitigating factors shifted the burden of persuasion to Smith; (4) irrelevant considerations were interjected into the sentencing decision by the charge given on lesser-included offenses; and (5) the jury was instructed on all statutory aggravating factors regardless of whether they were relevant to this case.

Smith raised these claims for the first time in his motion pursuant to Rule 3.850. The Florida Supreme Court refused to address the merits of these arguments because they "could have been presented on appeal" and were not. *Smith v. State*, 487 So.2d 1390, 1391 (Fla.1986). Smith has not shown sufficient cause or prejudice to excuse his failure to raise these claims on direct appeal. Procedural default thus bars consideration of these issues.

[10] On appeal, Smith does not deny procedural default. Rather, he contends that Florida so arbitrarily and inconsistently enforces its rule against collateral consideration of matters not raised on direct appeal that the rule is not an adequate procedural bar under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). This precise contention has been expressly rejected by this Court in *Booker v. Wainwright*, 764 F.2d 1371, 1379 (11th Cir.), *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985) and *Hall v. Wainwright*, 733 F.2d 766, 777 (11th Cir. 1984), *cert. denied*, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 859 (1985). In these cases, this Court found the Supreme Court of Florida is consistent in its application of the contemporaneous objection and procedural default rules in capital cases.

Race as a Factor in Sentencing

[12] Smith claims that race was used as a factor in the decision to sentence him to death. Proffering several general statistical studies, including that done by Gross and Mauro, Smith contends that he is entitled to an evidentiary hearing on this issue.

No evidentiary hearing is required in this case. Even assuming the validity of the statistical studies relied on by Smith, they are insufficient to demonstrate unconstitutional discrimination under the Fourteenth Amendment, or to show irrationality, arbitrariness or capriciousness under the Eighth Amendment. *See McCleskey v.*

Kemp, — U.S. —, 107 S.Ct. 1756, 95 L.Ed.2d 362 (1987).

Darrell BURCH, Plaintiff-Appellant,

v.

APALACHEE COMMUNITY MENTAL HEALTH SERVICES, INC., et al., Defendants-Appellees.

No. 85-8843.

United States Court of Appeals, Eleventh Circuit.

March 10, 1988.

Patient who was allegedly admitted to mental treatment facilities on strength of voluntary admission forms he signed while heavily medicated, disoriented, and apparently suffering from psychotic disorder brought civil rights action against facility and other defendants for depriving him of liberty without due process of law. The United States District Court for the Northern District of Florida, No. TCA 85-7081-WS, Stafford, Chief Judge, granted defendants' motion to dismiss for failure to state claim upon which relief could be granted, and patient appealed. The Court of Appeals affirmed, 804 F.2d 1540, and patient sought and was granted, 811 F.2d 1339, rehearing in banc. The Court of Appeals, Johnson, Circuit Judge, held that allegations in plaintiff's complaint were sufficient to state cause of action under § 1983 against facility and other defendants for violation of procedural due process rights.

Reversed and remanded.

Johnson, Circuit Judge, specially concurred and filed opinion, in which Vance, Kravitch and Hatchett, Circuit Judges, and Tuttle, Senior Circuit Judge, joined.

Clark, Circuit Judge, concurred and filed opinion.

Anderson, Circuit Judge, specially concurred and filed opinion in which Godbold, Senior Circuit Judge, joined.

Tjoflat, Circuit Judge, dissented and filed opinion in which Roney, Chief Judge, and Hill, Fay and Edmondson, Circuit Judges, joined.

Hill, Circuit Judge, concurred in Judge Tjoflat's dissent and filed opinion.

1. Civil Rights ⇐13.6(1)
Constitutional Law ⇐63(1)

Party admitted to mental health center had protected liberty interest, actionable under § 1983, in avoiding physical confinement of long-term mental hospitalization against his will. (Per Johnson, Circuit Judge, with five Judges concurring and two Judges specially concurring.) U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

2. Constitutional Law ⇐250(5)

Due process protection requires, in most cases, that person be accorded some type of hearing before being committed to mental institution. (Per Johnson, Circuit Judge, with five Judges concurring and two Judges specially concurring.) U.S.C.A. Const.Amend. 14.

3. Mental Health ⇐41

In limited cases, person may be involuntarily committed to mental institution without postcommitment hearing, as long as due process rights are vindicated by postcommitment hearing held shortly after initial detention. (Per Johnson, Circuit Judge, with five Judges concurring and two Judges specially concurring.) U.S.C.A. Const.Amend. 14.

4. Constitutional Law ⇐268(5)

Postdeprivation remedies will not vindicate party's due process rights, in not being committed to mental institution against his will, where predeprivation remedies are practicable. (Per Johnson, Circuit Judge, with five Judges concurring and two Judges specially concurring.) U.S.C.A. Const.Amend. 14.

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-3333

FRANK SMITH,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, Secretary, Florida Department of Corrections; TOM BARTON, Superintendent of Florida State Prison at Starke; ROBERT A. BUTTERWORTH, Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court of the Northern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Before HATCHETT and EDMONDSON, Circuit Judges, and ROWEY, Senior Circuit Judge.

PER CURIAM:

Action on the petition for rehearing in this case has been unduly delayed. The only issue of concern to the Court is the so-called Hitchcock issue. Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), was decided after this case was decided by

the district court and while it was on appeal. At one point on the appeal, petitioner, Frank Smith, sought to have the appellate proceeding held in abeyance pending resubmission of this issue to the state court. This motion was denied. If Smith had been entitled to relief on any other ground asserted on appeal, such delay by that procedure would not have been justified.

The Court, however, denied relief on all grounds initially asserted on this appeal by opinion dated March 9, 1988. The mandate has not been issued pending consideration of the Petition for Rehearing and Suggestion for Rehearing In Banc, and the supplemental briefs filed in connection therewith.

As far as is known to this Court, petitioner has not yet sought to resubmit the Hitchcock issue to the state court in light of the United States Supreme Court decision and subsequent cases decided by this court and the Florida Supreme Court.

It is inappropriate for this Court to deal with these issues on this petition for rehearing. The petition is denied without prejudice to the petitioner's properly presenting the claims to the Florida state courts, a procedure that is required by the exhaustion rule prior to the submission of the issue to the federal court. Were it not for Hitchcock v. Dugger, supra, this petition for rehearing would have been denied without comment. This Order

clarifies that the unexhausted claim based on these later cases is not foreclosed by this decision.

The Petition for Rehearing is DENIED, and no member of this panel nor other Judge in regular active service on the court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

ATTACHMENT 3

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 86-3333

D. C. Docket No. 84-7355

FRANK SMITH,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, Secretary, Florida Department of Corrections; TOM BARTON, Superintendent of Florida State Prison at Starke, Florida; ROBERT A. BUTTERWORTH, Attorney General of the State of Florida,

Respondents-Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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Before RONEY, Chief Judge, HATCHETT and EDMONDSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED.

Entered: March 9, 1988
For the Court: Miguel J. Cortez, Clerk

By: [signature]
Deputy Clerk

ISSUED AS MANDATE: OCT 24 1989

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 24 1989
MIGUEL J. CORTEZ
CLERK

NO. 86-3333

FRANK SMITH,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, Secretary, Florida Department of Corrections; TOM BARTON, Superintendent of Florida State Prison at Starke, Florida; ROBERT A. BUTTERWORTH, Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Florida

ORDER:

(X) The motion of appellant, Frank Smith for ( ) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of appellant, Frank Smith for ( ) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

[signature]
UNITED STATES CIRCUIT JUDGE

ORD-45

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-3333

FRANK SMITH,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections;
TOM BARTON, Superintendent of Florida
State Prison at Starke, Florida;
ROBERT A. BUTTERWORTH, Attorney General
of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

O R D E R:

Appellant's motion to hold proceedings in abeyance pending disposition of its Hitchcock issue in the Florida State courts is denied.

Jack W. Hatchett
United States Circuit Judge

ATTACHMENT 4

THE FLORIDA BAR, Complainant,

v.

William R. MERWIN, Respondent.

No. 60836.

Supreme Court of Florida.

April 15, 1982.

Dale E. Krout, Jr., Bar Counsel, Tallahassee, for complainant.

William J. Sheppard, Jacksonville, for respondent.

PER CURIAM.

This matter is before the Court on Petition for Approval of Conditional Guilty Plea for Consent Judgment and Entry of Final Order of Discipline to violations of Rule 11.02(3)(a) of the Integration Rule of The Florida Bar and Disciplinary Rules 1-102(A)(3) and (6) of the Code of Professional Responsibility of The Florida Bar. We approve the Petition, and we hereby reprimand Respondent, William R. Merwin, for these violations. The publication of this order in *Southern Reporter* shall serve as Respondent's public reprimand.

Costs in the amount of $311.65 are hereby taxed against the Respondent.

It is so ordered.

SUNDBERG, C.J., and ADKINS, BOYD, OVERTON and EHRLICH, JJ., concur.

Frank SMITH, Appellant,

v.

STATE of Florida, Appellee.

No. 57743.

Supreme Court of Florida.

Oct. 29, 1982.

Rehearing Denied Jan. 27, 1983.

Defendant was convicted in the Circuit Court, Wakulla County, Kenneth E. Cooksey, J., of robbery, kidnapping, sexual battery, and first-degree murder, and was sentenced to death, and defendant appealed. The Supreme Court held that: (1) filing of second indictment was not improper; (2) record established that no error occurred in admitting into evidence either prearrest or postarrest statements made by defendant; (3) no reversible error occurred in admitting evidence of collateral crimes; (4) it was not reversible error to deny defendant's requested instruction on defense of withdrawal; and (5) death sentence was properly imposed.

Affirmed.

1. **Indictment and Information** ⇐158(2)

Grand jury has no authority to amend indictment to charge additional or different offense. West's F.S.A. Rules Crim.Proc., Rules 3.140(j), 3.140 note.

2. **Indictment and Information** ⇐15(1)

Grand jury could file completely new indictment regarding same alleged criminal actions, even though prior indictment was pending, where second grand jury independently reviewed evidence before returning second indictment. West's F.S.A. Rules Crim.Proc., Rules 3.140(j), 3.140 note.

3. **Criminal Law** ⇐1167(4)

Second indictment filed 30 days before trial was not untimely and prejudicial, even though it included additional charge of premeditated murder.

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4. **Criminal Law** ⇐412.1(2)

Statements that are product of illegal detention are inadmissible.

5. **Criminal Law** ⇐412.2(1)

Suspect has right to consult with legal counsel before being questioned.

6. **Criminal Law** ⇐412.1(1)

Pretrial incriminating statements are admissible only if they are freely and voluntarily made.

7. **Criminal Law** ⇐412.1(3)

Record established that defendant's prearrest statements were not result of illegal detention but were made in stationhouse interview to which defendant voluntarily agreed.

8. **Criminal Law** ⇐412.1(1)

Record established that defendant's postarrest statements were freely and voluntarily made after defendant had been advised of his constitutional rights, including rights to legal counsel. U.S.C.A. Const. Amend. 6.

9. **Criminal Law** ⇐412.1(4)

Credibility of defendant's ultimate confession was material issue for jury to decide, and thus his earlier, exculpatory statements, and sequence of events showing how his story changed through course of several interviews, were relevant, and such statements and context in which they were given were also relevant to show defendant had attempted to avoid detention.

10. **Criminal Law** ⇐419(1)

Defendant's inconsistent statements were not inadmissible hearsay, especially where they were not offered to prove truth of matter stated but offered only to show context of defendant's confession. West's F.S.A. §§ 90.402, 90.801(1)(c), 90.802(2)(a).

11. **Criminal Law** ⇐368.2(3)

Other crimes evidence concerning alleged theft of gasoline was admissible where such theft was part of res gestae of criminal episode with which defendant was charged.

12. **Criminal Law** ⇐365(1), 1169.1(7)

Evidence concerning defendant's alleged theft of rifle was not part of res gestae of criminal episode, even though theft occurred during the same night, and thus it was error to admit such evidence; however, error was harmless in absence of showing of prejudice.

13. **Criminal Law** ⇐31

To establish common-law defense of withdrawal from crime of premeditated murder, defendant must show that he abandoned and renounced his intention to kill victim and that he clearly communicated his renunciation to his accomplices in sufficient time for them to consider abandoning the criminal plan.

14. **Criminal Law** ⇐31

Defense of withdrawal is available even after underlying felony or felonies, which subsequently formed basis of prosecution for felony-murder, have been completed.

15. **Criminal Law** ⇐770(2)

Defendant is entitled to have jury instructed on rules of law applicable to his theory of defense if there is any evidence to support such instructions.

16. **Criminal Law** ⇐1173.2(3)

In prosecution resulting in conviction for premeditated murder, any error in failing to instruct on defense of withdrawal on basis of one of defendant's pretrial statements was harmless.

17. **Criminal Law** ⇐1208(1)

Finding of death sentencing aggravating factor of commission of capital felony for purpose of avoiding arrest was supported by evidence.

18. **Homicide** ⇐354

No improper double consideration was given to single feature of crime in finding in death sentencing proceedings that murder was committed in course of statutorily enumerated felony and was committed for pecuniary gain where kidnapping and sexual battery supported aggravating circumstance of commission of murder in course of

felony, and robbery supported finding of commission of murder for pecuniary gain.

19. Homicide ⇐354

Victim's abduction, confinement, sexual abuse, and ultimate execution-style killing constituted "heinousness" for purposes of death sentencing proceeding.

See publication Words and Phrases for other judicial constructions and definitions.

20. Criminal Law ⇐1206(1)

Death sentencing aggravating factor of whether capital felony was committed in cold, calculated, and premeditated manner without any pretense of moral or legal justification was not void for vagueness. West's F.S.A. § 921.141(5)(i).

Philip J. Padovano, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and David P. Gauldin, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This cause is before the Court on appeal from a capital felony conviction for which a sentence of death was imposed. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant Frank Smith was convicted of robbery, kidnapping, sexual battery, and first-degree murder. The evidence showed that late in the evening on December 12, 1978, appellant and two accomplices went to a convenience store in Wakulla County and robbed store clerk Sheila Porter of money belonging to her employer. Then they abducted Sheila Porter from the store and took her into neighboring Leon County. There they took her to a motel room where all three men committed sexual battery upon her. Afterwards they took her to a wooded area. Accomplice Victor Hall testified at trial that he waited in the car while appellant and Johnny Copeland walked Sheila Porter into the woods. Then he heard three gunshots, after which appellant and Copeland returned to the car without Sheila. Her body was found two days later with three bullet wounds in the back of her head.

Appellant was initially indicted in Wakulla County for first-degree felony murder, robbery, kidnapping, and sexual battery. After his motion for change of venue was granted, trial commenced in Jefferson County but ended in a mistrial. Thereafter the prosecution was again taken up in Franklin County, where a second grand jury issued an indictment charging appellant with premeditated murder, robbery, kidnapping, and sexual battery. After trial the jury found appellant guilty of first-degree murder, robbery, kidnapping, and sexual battery. In accordance with the jury's recommendation, the trial judge imposed a sentence of death.

Appellant raises several questions regarding the validity of his conviction. He argues that the filing of the second indictment was improper; that the court erred in admitting into evidence some of his pretrial statements; that the court erred in admitting evidence of collateral crimes; and that the court erred in denying his requested instruction on the defense of withdrawal. Appellant also challenges as improper the imposition of the sentence of death. We find no reversible error and affirm the convictions and the sentence of death.

[1, 2] Appellant argues that the indictment was defective and should have been dismissed, on two grounds. He argues that the grand jury had no authority to make a substantive change in the pending indictment and he argues that the new indictment was filed so immediately prior to the commencement of the trial as to prejudice him in the preparation of his defense. Initially, the new indictment was captioned "Amended Indictment." Appellant moved to dismiss on the ground that a grand jury may not amend an indictment. Thereafter, the state moved to have the word "amended" stricken from the caption, asserting that it was a clerical error. The trial court denied appellant's motion and granted the state's. The court determined that the second grand jury had independently examined the evidence and had filed a new,

rather than an amended, indictment. At the beginning of the trial the state filed a notice of *nolle prosequi* with regard to the first indictment. Appellant is correct in his argument that a grand jury has no authority to amend an indictment to charge an additional or different offense. *See* Fla.R. Crim.P. 3.140(j) and Committee Note (1968). *State v. Black*, 366 So.2d 1272, 1275–77 (Fla. 1980) (England, J., concurring). However, a grand jury may file a completely new indictment regarding the same alleged criminal actions, even though a prior indictment is pending. *See* Committee Note, Fla. R.Crim.P. 3.140(j) (1968); *Eldridge v. State*, 27 Fla. 162, 9 So. 449 (1891).

So, a grand jury may charge a defendant with an additional or different offense by filing a second indictment. Although it may appear that the result is the same, the process is significantly different. Before filing the second indictment, the grand jury must independently evaluate the case. This requirement ensures that the grand jury itself finds the filing of additional or different charges appropriate. Since there is nothing in the record which refutes the trial court's finding that the second grand jury independently reviewed the evidence before returning the second indictment, there is no basis for us to disturb the court's ruling.

[3] Appellant argues that the second indictment was untimely and prejudicial. We note that it was filed twenty days before the trial. Thus appellant had twenty days to prepare his defense against the additional charge of premeditated murder. This amount of preparation time was not insufficient considering the fact that the question of premeditation was already at issue in connection with the issues of intent to withdraw and intent to murder to avoid apprehension and prosecution.

Appellant's next two points on appeal concern the admissibility of pretrial statements he made to law enforcement officers before and after his arrest. Appellant argues that the statements were inadmissible because they were made after he was illegally detained, because he was denied his right to consult with counsel, and because the statements were not freely and voluntarily made.

[4–6] Appellant invokes certain constitutional rules of evidence. Statements that are the product of illegal detention are inadmissible. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). A suspect has the right to consult with legal counsel before being questioned. *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). Pretrial incriminating statements are only admissible if they are freely and voluntarily made. The facts as shown by the record, however, do not support any of appellant's contentions regarding the admissibility of his statements.

In the afternoon of December 13th, after Sheila Porter had been reported missing, police stopped appellant in Tallahassee and questioned him. Investigators had been told by a citizen that appellant owned a car matching the description of a car mentioned on the television news. Appellant allowed officers to photograph his car and told them he had been at his grandmother's house in Tallahassee the previous night.

Officers learned from another officer that the car in their photograph had been seen parked outside a Tallahassee motel the night before. Because of this discrepancy with appellant's story, an officer went to see appellant again that evening. The officer asked appellant to accompany him to the police station for questioning, but advised him he was not obliged to go. Appellant agreed to go. At the police station appellant told investigators he had spent the night alone at the motel after being stood up by a girlfriend. He denied having been in Wakulla County the night before. After the interview appellant declined a ride home and waited several hours for his friend Johnny Copeland who was also there being questioned. He finally was taken home by police officers at about 5:00 a.m., December 14.

Later that day, after gaining information indicating that appellant's car had been seen parked at the convenience store near

the time of Sheila Porter's disappearance, police sought a warrant for appellant's arrest. He was arrested at 7:00 p.m., December 14, and again agreed to talk to investigators. He told them that he went with Johnny Copeland to the convenience store, but that he was asleep in the back seat of the car. He said that when he awoke there was a white girl huddled down in the front seat, and he told Copeland to get her out of his car. So, Copeland took the girl and put her in his own car. Appellant said that the next time he saw Copeland, Copeland said that he had done something to the girl and described the area where he left her. Appellant then showed police to the general area where the body was subsequently discovered.

On the morning of December 15, after helping police search for the body, appellant talked to an attorney, but did not reach a formal agreement for representation. At his first appearance later that day, appellant told the judge that he did not have an attorney but was planning to get one. Three days later appellant told his jailer that he wanted to make a statement. Police advised him of his rights and he signed a waiver form. He confessed to participating in the robbery and kidnapping. He said he was present when Johnny Copeland and Victor Hall raped Sheila Porter, but he denied participating in the rape. He said he was present when Copeland shot Sheila, and said he tried to talk him out of doing so. This account was inconsistent with the trial testimony of Victor Hall, who said that Smith did participate in the sexual battery. Hall also testified that when appellant and Copeland took the victim into the woods and three shots were fired, it was appellant who was holding the gun when they came back.

[7] The state introduced all of these statements into evidence. Before each questioning session, appellant was advised of his rights in accordance with the *Miranda* form. Appellant argues however that his pre-arrest statements were inadmissible because his detention was illegal. The detention was illegal, appellant contends, because the police did not have probable cause for an arrest. The argument is without merit. Before his arrest pursuant to warrant, appellant was not detained and was not required to answer questions. He voluntarily agreed to be interviewed.

[8] Appellant argues that his post-arrest statements were inadmissible because they were made without benefit of legal counsel. This argument also is without merit. The record shows that the statements were freely and voluntarily made after appellant had been advised of his constitutional rights. At no time did appellant ask to see a lawyer or state that he was represented by a lawyer. The evidence as a whole shows that appellant, in making the statements, was not coerced in any manner.

[9] Appellant also argues that his inconsistent exculpatory pre-trial statements were improperly admitted to impeach other pre-trial statements. He contends that since he was not a witness his credibility was not in issue and such impeachment evidence was therefore irrelevant. We disagree. The credibility of appellant's ultimate confession was, of course, a material issue for the jury to decide. His earlier exculpatory statements, and the sequence of events showing how his story changed through the course of several interviews, were certainly relevant to this issue. Furthermore, the earlier statements and the context in which they were given were also relevant to show that appellant had attempted to avoid detection by lying to the police. *See Corine v. State*, 155 Fla. 588, 185 So. 320 (1939); 1 Wharton's Criminal Evidence, § 210 (13th ed. 1972). As such they were an indication of guilt, the ultimate material issue.

[10] Since the statements were thus relevant, they were to be deemed admissible unless excluded by some specific rule of law. § 90.402, Fla.Stat. (1979). Contrary to the claim of appellant, the statements were not inadmissible as hearsay, because they were made by the defendant and were therefore exempted from the hearsay rule. *Id.* § 90.803(18)(a). Furthermore, the exculpatory statements were offered not to prove the truth of the matters stated, but rather to show [illegible] of appellant's confession, as they were not even hearsay at all. *Id.* § 90.801(1)(c).

Appellant contends that the court erred in admitting evidence of collateral crimes. Over appellant's objection, Victor Hall was allowed to testify that on the day of the robbery appellant stole some gasoline and a .22 caliber rifle. Appellant argues that the evidence was not relevant to show anything other than propensity to commit crime since there was no evidence of a relation between these matters and the crimes charged. The evidence showed that the crimes were committed with a .22 caliber pistol, not a rifle.

[11] The evidence of the theft of the gasoline was relevant and therefore admissible, but the evidence of the theft of the rifle was irrelevant and therefore inadmissible. The theft of the gasoline was part of the *res gestae* of the criminal episode. *See Smith v. State*, 365 So.2d 704 (Fla.1978), *cert. denied*, 444 U.S. 965, 100 S.Ct. 177, 62 L.Ed.2d 113 (1979); *Ashley v. State*, 265 So.2d 685 (Fla.1972). The evidence was connected in that it showed how appellant and his accomplices were able to get around to commit the crimes and it showed motivation in that it suggested their need for money.

[12] The theft of the rifle is not so connected with the crimes charged. That it occurred the same night is not enough to bring it within the *res gestae*. Although the evidence was irrelevant, appellant has failed to show how he was prejudiced. The testimony concerning the theft of the rifle was insignificant compared with the whole of the evidence of appellant's guilt of the crimes charged. Since appellant has failed to show how the jury's decision could have been influenced by this one irrelevant statement, we find the error to be harmless. *See State v. Wadsworth*, 220 So.2d 4 (Fla. 1969).

Finally, appellant argues that his conviction should be reversed and a new trial granted because the court refused his requested jury instruction on the defense of withdrawal. He asserts that the evidence to support this defense was found in the confession in which he admitted participating in the robbery and kidnapping but maintained that he tried to talk Copeland out of killing the victim.

This contention is without merit. Victor Hall testified that after the multiple rape, he, Copeland, and appellant took Sheila Porter by automobile to a wooded area and that Copeland and appellant took the girl into the woods. Then, Hall said, he heard three gunshots, following which Copeland and appellant returned to the car. Hall said that at this point appellant was holding the pistol.

There are two theories upon which the jury might have found appellant guilty of first-degree murder based upon all the evidence, including Hall's testimony. Since there was no direct evidence establishing whether it was Copeland or appellant who actually wielded the murder weapon, the jury could have simply concluded that one of them fired the fatal shots and that the other aided and abetted the murder. § 777.011, Fla.Stat. (1977). Under this theory, assuming that only one person did the actual killing, the other could be found guilty of premeditated murder if the evidence was sufficient to show that he aided, abetted, counseled, hired, or otherwise procured the commission of the offense of premeditated murder, and it is not necessary that the jury actually determine which man did the killing and which one aided and abetted. *E.g., Sims v. State*, 90 So.2d 860 (Fla. 2d DCA), *cert. denied*, 357 U.S. 910, 78 S.Ct. 1157, 2 L.Ed.2d 1160 (1958).

The other theory upon which the jury could have found appellant guilty of first-degree murder is the felony murder doctrine. Under this theory appellant, as a joint participant in the crime of kidnapping, may be held liable for the acts of his co-felons and is therefore equally guilty, with the actual killer, of the murder which was a natural outgrowth and consequence of the kidnapping. Under this theory the jury

would not have worked to conclude that appellant had the requisite intent to be an aider and abettor.

[13, 14] Under either of these theories of liability, the defense of withdrawal may be established if the defendant is able to make the requisite showing. To establish the common-law defense of withdrawal from the crime of premeditated murder, a defendant must show that he abandoned and renounced his intention to kill the victim and that he clearly communicated his renunciation to his accomplices in sufficient time for them to consider abandoning the criminal plan. 1 C. Torcia, Wharton's Criminal Law § 37 (14th ed. 1978); 40 C.J.S. Homicide § 9. For a defendant whose liability is predicated upon the felony murder theory, the required showing is the same and the defense is available even after the underlying felony or felony-murder has been completed. Again the defendant would have to show renunciation of the impending murder and communication of his withdrawal to his co-felons in sufficient time to allow them to consider refraining from the homicide.

Appellant contends that he was entitled to an instruction on withdrawal because his last pretrial statement, which was entered into evidence by way of police testimony, said that Copeland was the killer and that appellant tried to talk Copeland out of killing the girl. The testimony of Hall was that Copeland and Smith both agreed to the killing. Hall's testimony made no mention of any communication of withdrawal by appellant during the automobile trip from the motel to the murder scene. Defense counsel surely could have attempted to bring out such facts on cross-examination if Hall had heard any such renunciation.

As was pointed out above, the evidence upon which appellant relies in arguing that he was entitled to the instruction is his final pretrial statement. It is worthy of note that appellant moved to suppress his pretrial statements and that the denial of his motion to suppress is made the subject of one of his points on this appeal.

[15, 16] Appellant correctly points out that a defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions. *Motley v. State*, 155 Fla. 545, 20 So.2d 796 (1945); *Smythe v. State*, 356 So.2d 113 (Fla. 3d DCA), *cert. denied*, 368 So.2d 1172 (Fla. 1978); *Hopkins v. State*, 270 So.2d 410 (Fla. 4th DCA 1972); *Cotundo v. State*, 139 So.2d 713 (Fla. 3d DCA 1962). If there is any evidence of withdrawal, an instruction should be given. The trial judge should not weigh the evidence for the purpose of determining whether the instruction is appropriate. Appellant's pretrial statement, however, testified to by a state witness, seems hardly sufficient to raise the issue of withdrawal in view of the above-discussed facts. Without formulating any general harmless error rule regarding improper denial of instructions on defenses, we hold that here the error, if any, was harmless. No new trial is required.

We come now to consideration of the imposition of a sentence of death upon appellant. After the hearing [illegible] the sentencing phase [illegible] and argument, the jury recommended [illegible]. The court found six statutory aggravating circumstances and one statutory mitigating circumstance. The court found: that appellant had twice previously been convicted of felonies involving the use or threat of violence; that the capital felony was committed in the course of a kidnapping and in the course of flight after the commission of rape; that the capital felony was committed to prevent detection and arrest; that the capital felony was committed for pecuniary gain; that the capital felony was especially heinous, atrocious, or cruel; and that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The court found that appellant's youthful age of nineteen at the time of the crime was a mitigating circumstance.

Appellant argues that the death penalty may not be imposed where the capital felony conviction is based on the vicarious liability of felony murder. This argument is

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argument is based on the concept of proportionality under the cruel and unusual punishment clause of the Eighth Amendment. Appellant relies on *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), where Justice White, concurring, said "that it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 634, 98 S.Ct. at 2988. Since then the United States Supreme Court has held in a felony murder case that a sentence of death may not be imposed in the absence of proof that the defendant killed, attempted to kill, intended to kill, contemplated that life would be taken, or anticipated that lethal force would or might be used. *Enmund v. Florida*, —— U.S. ——, 102 S.Ct. 3368, 3372, 3379, 73 L.Ed.2d 1140 (1982). It is unnecessary, however, for us to try to apply that holding in this case, since here there was sufficient evidence from which the jury could have found appellant guilty of premeditated murder.

[17] Appellant argues that the court's finding that the capital felony was committed for the purpose of avoiding arrest is not supported by evidence. This argument has no merit since Victor Hall testified that on two separate occasions appellant and Johnny Copeland talked about killing Sheila Porter so that she would not be able to testify against them.

[18] Appellant argues that the court erred by giving improper double consideration to a single feature of the crime in finding the murder was committed in the course of a statutorily enumerated felony and for pecuniary gain. This argument overlooks the fact that the former aggravating circumstance was based on kidnapping and sexual battery, leaving the factor of robbery to support the finding of the latter circumstance without any overlap.

[19] Appellant argues that the finding of heinousness was improper. This argument is refuted by the proven facts of the abduction, confinement, sexual abuse, and ultimate execution-style killing of the victim. *See Knight v. State*, 338 So.2d 201 (Fla.1976).

[20] Finally, appellant challenges the court's application of the factor that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. § 921.141(5)(i), Fla.Stat. (1979). This statutory aggravating circumstance was added to the capital felony sentencing statute by the 1979 legislature. Ch. 79-353, Laws of Fla. Thus it was enacted after the commission of the offense in this case. Appellant argues that this new provision is unconstitutionally vague and invalid in that it does not require the proof of any additional fact not already required to establish the offense itself.

We reject the contention that paragraph (5)(i) is void for vagueness. This new aggravating circumstance was enacted to limit the use of premeditation as an aggravating circumstance in cases of first-degree murder. Premeditation is only to be relied upon as an aggravating factor when the capital felony was committed in a cold and calculated manner without any pretense of moral or legal justification. *See Combs v. State*, 403 So.2d 418 (Fla.1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). Paragraph (5)(i) may be applied to murders committed before its effective date. *Id.* We conclude that there was an ample basis for the judge to follow the jury's recommendation of a sentence of death.

The appellant's convictions for robbery with a firearm, kidnapping, sexual battery, and murder in the first degree are affirmed. The sentence of death is also affirmed.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON and McDONALD, JJ., concur.

Frank SMITH, Appellant,

v.

STATE of Florida, Appellee.

Frank SMITH, Petitioner,

v.

Louie L. WAINWRIGHT, Etc., Respondent.

Nos. 63,991, 63,992.

Supreme Court of Florida.

Oct. 11, 1984.

On appeal from denial by the Circuit Court in and for Wakulla County, Kenneth L. Cooksey, J., of motion for postconviction relief, petition for writ of habeas corpus and motion for stay of execution of sentence, the Supreme Court, Boyd, C.J., held that: (1) issues that either were or could have been presented on appeal were not proper grounds for collateral challenge of convictions or sentence; (2) movant did not make sufficient showing to require trial court to hold hearing on claim that death sentence was product of racially discriminatory sentencing practices; and (3) movant failed to show any deficiency or deviation from professional standards of competence on part of defense counsel at his trial.

Judgment affirmed, petition denied and motion denied.

Shaw, J., concurred in result only.

1. Criminal Law ⇐998(3)

Issues that either were or could have been presented on appeal were not proper grounds for collateral challenge of convictions or sentence. West's F.S.A. RCrP Rule 3.850.

2. Criminal Law ⇐998(18)

Movant did not make sufficient showing to require trial court to hold hearing on claim that death sentence was product of racially discriminatory sentencing practices. West's F.S.A. RCrP Rule 3.850.

3. Criminal Law ⇐998(19)

Trial court properly held evidentiary hearing on movant's claim that performance of his trial defense counsel was deficient.

4. Criminal Law ⇐998(8)

Convicted person claiming that performance of trial counsel was deficient must identify specific acts or omissions that were deficient in sense that they were outside wide range of professionally competent assistance.

5. Criminal Law ⇐998(8)

Inquiry into whether trial defense counsel was deficient must be based on presumption of competence and deferential approach to counsel's strategy and tactics; claimant who meets this requirement must then establish that deficiency was such that there is reasonable probability that result of proceeding would have been different.

6. Criminal Law ⇐998(8)

Movant failed to show any deficiency or deviation from professional standards of competence on part of defense counsel at his trial.

Baya Harrison, III, Tallahassee, Billy H. Nolas of Plunkett, Nolas and Donnard, New York City, and Santha Sonenberg, Public Defender Service for the District of Columbia, Washington, D.C., for appellant/petitioner.

Jim Smith, Atty. Gen. and Lawrence A. Kaden, Asst. Atty. Gen., Tallahassee, for appellee/respondent.

BOYD, Chief Justice.

These consolidated cases are before the Court on (1) appeal from the denial of a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 and (2) a petition for writ of habeas corpus. Appellant-Petitioner has also filed a motion

ATTACHMENT 5

for stay of execution of sentence. We affirm the denial of the motion for post-conviction relief and deny the petition for habeas corpus. Having resolved all issues adversely to appellant-petitioner, we deny his motion for stay of execution.

Frank Smith is a state prisoner under sentence of death. By jury trial he was convicted of first-degree murder, robbery, kidnapping, and sexual battery. In accordance with the recommendation of the jury, Smith was sentenced to death on the first-degree murder conviction. He was entitled to and received appellate review of his convictions and sentence of death. This Court affirmed the convictions and the sentence of death. *Smith v. State*, 424 So.2d 726 (Fla.1982). Smith's subsequent petition for review was denied by the United States Supreme Court. *Smith v. Florida*, — U.S. —, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983).

Appeal of Denial of Rule 3.850 Motion

Appellant's motion to vacate, set aside or correct judgment and sentence raised the following issues: (1) that jurors were improperly excused for cause due to their opposition to capital punishment and that, even if they were properly excused, imposing such "death qualifications" deprived appellant of trial by a jury drawn from a representative cross-section of the community; (2) that the jury instruction given on the process of weighing aggravating and mitigating circumstances placed the burden on the defendant to prove that death was not the appropriate penalty; (3) that the state at trial was improperly allowed to bolster the credibility of a principal witness before the defense had attempted to impeach him, violating the defendant's right of confrontation; (4) that the trial court erred in refusing to instruct the jury on the defense of withdrawal; (5) that the giving of jury instructions on all lesser degrees of homicide, attempted murder, and felony murder is a practice conducive to arbitrariness in violation of the Eighth Amendment; (6) that instructing the jury on all the statutory aggravating circumstances was improper; (7) that the trial court erroneously instructed the jury that its decision to recommend either life or death would have to be made by a majority vote; (8) that the trial court so instructed the jury on mitigating circumstances as to limit consideration to statutory mitigating circumstances and that the court limited its own consideration thus as well; (9) that appellant did not receive the effective assistance of counsel at trial; and (10) that appellant's sentence of death was a product of systematic racial discrimination in capital sentencing.

[1] All but the last two of these arguments are issues that either were or could have been presented on appeal and are therefore not proper grounds for collateral challenge of the convictions or sentence. *See Booker v. State*, 441 So.2d 148 (Fla. 1983). Appellant argues that these grounds are cognizable even though not raised on appeal, or even though raised on appeal and decided adversely to appellant, because they constitute fundamental error. We reject this contention and find that issues (1) through (8) above were properly summarily denied by the trial court as improper grounds for a Rule 3.850 claim.

[2] The claim that the death sentence was the product of racially discriminatory sentencing practices is in theory one that can be raised by motion under Rule 3.850. *See Henry v. State*, 377 So.2d 692 (Fla. 1979). However, we find that appellant did not make a sufficient showing to require the trial court to hold a hearing on the claim and we therefore affirm the trial court's summary denial of relief on this ground. *See State v. Washington*, 453 So.2d 389 (Fla.1984).

[3-5] The trial court properly held an evidentiary hearing on appellant's claim that the performance of his trial defense counsel was deficient. Under *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a convicted person making such a claim must identify specific acts or omissions that were deficient in the sense that they "were outside the wide range of professionally competent

assistance." *Id.* 104 S.Ct. at 2066. The inquiry must be based on a presumption of competence and a deferential approach to counsel's strategy and tactics. The claimant who meets this requirement must then establish that the deficiency was such that there is a reasonable probability that the result of the proceeding would have been different. The United States Supreme Court explained that this second element of the necessary showing—prejudice—was shown by a failure of the adversarial testing process sufficient to undermine confidence in the outcome.

[6] The trial court found that appellant had failed to show any deficiency or deviation from professional standards of competence on the part of defense counsel at appellant's trial. We agree and approve the trial court's analysis of the facts as follows:

> The defendant was represented at trial and on direct appeal by Mr. Philip J. Padovano. Mr. Padovano represented the defendant for six (6) years from December, 1978, through the summer of 1984 until this claim was lodged against him. He represented the defendant during all phases of discovery, pre-trial hearings, the guilt phase of the trial, the penalty phase, and the direct appeal to the Florida Supreme Court.
>
> Mr. Padovano is an experienced criminal trial lawyer with over one hundred (100) jury trials to his credit. As of the time of the defendant's trial in this case, Mr. Padovano had been involved in more than fifty jury trials. Moreover, he secured the assistance in this case of another experienced trial attorney, Mr. Martin Murray, of St. Petersburg, Florida, who had previously represented defendants in capital cases. Furthermore, Mr. Padovano has been a member of the Florida Bar for eleven (11) years and has had no grievances or claims of ineffectiveness filed against him previously.
>
> Mr. Padovano was able to effectively communicate with the defendant through every stage of the proceedings. In fact, the defendant wrote often to Mr. Padovano and never expressed the notion that he was less than pleased with Mr. Padovano's representation. The only complaint the defendant expressed was the speed at which Mr. Padovano responded to his letters. However, this was during a two year period awaiting the Florida Supreme Court's opinion on direct appeal.
>
> In preparing for trial Mr. Padovano spoke with hundreds of potential witnesses including members of the defendant's family. They included the defendant's sister, Jessie Smith-Givens, and his grandmother, Caldonia Smith. After interviewing these two individuals Mr. Padovano determined their testimony would not be helpful during the penalty phase of the proceedings and made the strategic choice not to call them as witnesses in defendant's behalf. He determined Jessie Smith-Givens was in a branch of the armed services and would be going to Germany thus unavailable to testify. However, he made it clear her distance from the proceeding was not the reason he chose not to call her to testify. In addition, he determined Caldonia Smith's testimony in the penalty phase would not be helpful. She had told him she did not think she could live through the experience as her health was very poor and that she did not want to testify in any event.
>
> Mr. Padovano's pre-trial discovery included the deposition of co-defendant, Victor Hall, who had testified during the trial in the guilt phase that the defendant was the one carrying the "smoking gun" when Johnny Copeland (the other co-defendant) and Smith returned to the car from the woods in which Sheila Porter was murdered. On cross-examination, Mr. Padovano was able to impeach Hall by getting him to admit he had "lied" to the jury on direct examination. Afterward, Hall broke down and cried on the witness stand. Due to Hall's total impeachment in front of the jury, Mr. Padovano did not even "elevate to a decision" whether to call Hall as a witness in the penalty phase. While Mr. Padovano did

not have an opportunity to scrutinize every detail of Hall's affidavit which the defendant attached to his motion for post-conviction relief, he was able to determine the affidavit is inconsistent with Hall's trial testimony. This fact is supported by the record.

In an effort to bring mitigating factors to the attention of the jury, Mr. Padovano obtained the services of Dr. Wallace Kennedy, a licensed psychologist and professor of psychology at Florida State University. Dr. Kennedy examined the defendant pursuant to this Court's order. He reported to Mr. Padovano that the defendant had no congenital or physiological defects. Moreover, he advised that the defendant was not incompetent or insane and did not suffer from any type of brain dysfunction. Dr. Kennedy advised Mr. Padovano the defendant was a secondary psychopath, a mental disorder acquired after birth but which does not rise to the level of incompetency or insanity. Dr. Kennedy advised further that his prognosis of Smith's future behavior was very poor. He indicated his testimony would be harmful rather than helpful and, in fact, it was his opinion Smith would kill again. Based on this information, Mr. Padovano reminded Dr. Kennedy of the attorney-client privilege and made the strategic choice not to call him as a defense witness at the penalty phase.

Mr. Padovano later learned from a subsequent conversation with Dr. Kennedy that the defendant suffered from epilepsy as a child. However, in contacting the office of Smith's physician, Dr. Brickler, Mr. Padovano was unable to verify whether or not Smith was ever a patient of Dr. Brickler.

Mr. Padovano did not have separate strategies for the guilt phase of the trial and the penalty phase. Based on the statements given the police by Smith and his co-defendants, especially Victor Hall who put the gun in Smith's hand, as well as the other State's evidence, a trial strategy was developed long before trial that the State would be held to its burden of proof. Furthermore, the defense strategy was to show that although Smith was involved in the underlying felonies he was not the murderer but rather tried to withdraw and talk Johnny Copeland out of killing Sheila Porter when he learned lethal force was about to be used against her. Thus, he argued Smith was not deserving of the death penalty. Mr. Padovano felt confident the jury was accepting his argument during the guilt phase that Smith was not the triggerman and that Hall could not be believed when the jury returned and asked what the highest offense Smith could be convicted of if he did not pull the trigger. While the question had a positive impact on Mr. Padovano, he testified it would not have changed his approach and served only to reinforce the defense strategy.

Based on the foregoing, the entire testimony before this Court in defendant's Rule 3.850 motion hearing and on the record of this case, I find the defendant's trial counsel, Mr. Philip J. Padovano, did not call character witnesses to testify in mitigation at the penalty phase for the reason their testimony would have been harmful rather than helpful. Such harmful testimony would have supported aggravating circumstances rather than mitigating ones. I find based upon the testimony that Mr. Padovano elected not to present the evidence in question and it was a considered strategic judgment.

We find that the appellant failed to establish the first element of the *Strickland v. Washington* test for ineffective assistance of counsel and therefore affirm the trial court's denial of post-conviction relief.

Petition for Habeas Corpus

Smith's habeas corpus petition raises the issue of denial of effective assistance of counsel on appeal. By means of this challenge to appellate counsel's performance, petitioner seeks to have this Court to provide belated review of issues which were not argued on appeal but which petitioner says should have been argued and would

have resulted in favorable appellate relief if they had been argued.

Again, under *Strickland v. Washington*, petitioner must first show that his counsel's performance fell short of prevailing professional norms, then must show a reasonable likelihood that the deficiency affected the outcome. Bearing in mind the presumption of competence and the required deference to counsel's strategic choices, as taught by *Strickland v. Washington*, we find that petitioner has not identified any act or omission of his former appellate counsel that constituted a deficiency or deviation from professional norms. We therefore decline to allow petitioner to use the ineffectiveness challenge as a vehicle for further appellate review of his convictions and sentence.

The judgment of the circuit court is affirmed and the petition for writ of habeas corpus is denied. The motion for stay of execution is denied.

It is so ordered.

ADKINS, OVERTON, ALDERMAN, McDONALD and EHRLICH, JJ., concur.

SHAW, J., concurs in result only.

THE FLORIDA BAR, Complainant,
v.
R. Bruce JONES, Jr., Respondent.
No. 63853.
Supreme Court of Florida.
Oct. 18, 1984.

In a bar disciplinary proceeding, the Supreme Court held that an attorney who engages in conduct involving misrepresentation and neglect of a legal matter entrusted to him, which is cumulative to previous misconduct, is subject to suspension from the practice of law for six months, with proof of rehabilitation required before reinstatement.

Order in accordance with opinion.

Attorney and Client ⇐28

An attorney who engages in conduct involving misrepresentation and neglect of a legal matter entrusted to him, which is cumulative to previous misconduct, is subject to suspension from the practice of law for six months, with proof of rehabilitation required before reinstatement. West's F.S.A. Code of Prof.Resp., DR1-102(A)(4), DR6-101(A)(3).

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, and Michael D. Powell, Bar Counsel, Fort Lauderdale, for complainant.

Charles L. Brown, Brown & Pickett, West Palm Beach, for respondent.

PER CURIAM.

This is a disciplinary proceeding is before us on a referee's report recommending that R. Bruce Jones, Jr. be found guilty of misconduct and recommending that Jones be suspended from the practice of law for six months. Neither The Florida Bar nor Jones has contested the referee's report. We have jurisdiction pursuant to article V, section 15 of the Florida Constitution.

The referee found that Edward Bussey retained Jones to represent him in a personal injury action. Bussey had received $9,291.35 in medical services from a hospital, which filed a lien for that amount. Jones advised the attorney representing the hospital that he had received only $10,000.00 for Bussey's personal injuries. The hospital's counsel agreed to settle the hospital's claim against Bussey for $8,000.00. Jones had in fact received a $25,000.00 settlement on behalf of Bussey. Jones failed to pay the $8,000.00 settlement to the hospital until after the hospital filed suit